In The
Supreme Court of the United States

NATIONAL ADVERTISING CO.,
a Delaware corporation,

Petitioner,

v.

CITY OF MIAMI,
a Florida municipal corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 17, 2005

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QUESTIONS PRESENTED

1. Where municipal zoning officials have rejected applications for permits to build outdoor signs and the applicable sign code expressly prohibits both the signs and a variance, is it necessary for the applicant to take the futile step of appealing the rejection or seeking a variance before making a facial First Amendment challenge to the sign code?

2. Must an applicant for an outdoor sign permit exhaust administrative remedies before bringing an action under 42 U.S.C. § 1983 alleging that a municipal sign code facially abridges the First Amendment?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. National Advertising Co. is wholly owned by Viacom Outdoor, Inc. which is wholly owned by Viacom, Inc. Therefore, there is no parent or publicly held company owning 10% or more of National Advertising Co.'s stock.

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INTRODUCTION

This petition seeks review of a decision of the Eleventh Circuit Court of Appeals holding that National Advertising Co.'s attack on the City of Miami's Sign Code was not ripe, even though City zoning officials denied National's applications for six sign permits outright and despite the fact that the Sign Code expressly prohibits the signs that National sought to erect. The Eleventh Circuit's ruling is flatly inconsistent with this Court's prior holdings that where a zoning ordinance leaves no discretion for the zoning authority to permit the use sought by the landowner, the landowner need not submit repeated applications for inevitable denial before challenging the applicable ordinance. Moreover, in the First Amendment context, the very existence of an overly broad ordinance may chill protected speech. In keeping with this principle, this Court has repeatedly held that the ripeness doctrine is somewhat relaxed in the First Amendment arena and that the exhaustion of administrative remedies is not a prerequisite to actions under 42 U.S.C. § 1983. The Eleventh Circuit's decision, holding that National's First Amendment challenge to the City of Miami's Sign Code pursuant to 42 U.S.C. § 1983 is not fit for judicial review, ignores these fundamental principles and should be reversed.

This petition is submitted simultaneously with a petition seeking review of the Eleventh Circuit's decision in *National Advertising Co. v. City of Miami*, 402 F.3d 1329 (11th Cir. Mar. 21, 2005). In that decision, the Eleventh Circuit held that the City's amendment of its Sign Code mooted a facial overbreadth attack on the Sign Code despite the fact that the City was continuing to enforce the old ordinance by requiring National to remove signs that violated the old ordinance. In both actions, National

challenged the facial constitutionality of the City's Sign Code. In both actions, the Eleventh Circuit refused to review the merits of the challenges in derogation of decisions of this Court and of other federal courts of appeals.

CITATIONS OF THE OPINIONS AND ORDERS IN THE CASE

National Advertising Co. v. City of Miami, 288 F. Supp. 2d 1282 (S.D. Fla. Sept. 26, 2003) (App. 11), *aff'd*, 402 F.3d 1335 (11th Cir. Mar. 21, 2005) (App. 1).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued a decision in this case on March 21, 2005. (App. 1). National Advertising Co. filed a timely petition for rehearing or rehearing en banc on April 11, 2005. The Eleventh Circuit denied the petition on May 20, 2005. (App. 104). Justice Kennedy granted National through Monday, October 17, 2005, to file this petition. This Court has jurisdiction to review the judgment of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amends. I & XIV (App. 106); portions of the City of Miami Zoning Ordinance 11,000, as amended (App. 107).

STATEMENT OF THE CASE

National is a wholly owned subsidiary of Viacom Outdoor, Inc., the largest outdoor advertising company in the United States, Canada and Mexico. (D2/9/1-3).[1] National operates more than forty (40) outdoor advertising signs in the City of Miami. (D2/9-5). The signs are available to local and national advertisers for commercial and noncommercial messages similar to newspaper and broadcast advertising. (D2/9/7). National itself displays noncommercial messages on its signs from time to time advocating a variety of causes such as "Stand Up for Public Schools," "Open Your Heart to the Homeless," and "Learn CPR. Help Save a Life." (D2/35/22-33 & Ex.18; D1/9/Ex.3/5).

In August and September, 2001, National located six pieces of privately-owned property in areas designated by the City's Zoning Ordinance as Commercial "C-1" Zones and executed leases with the owners of those locations to use the properties for the construction and operation of outdoor advertising signs. (D2/35/9-10 & Ex.2-7). National paid each of the property owners a fee of $500 to $1,000 to keep the properties available while National sought permits, and National agreed to pay additional rent after the signs were erected. (D2/35/12).

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[1] In the Eleventh Circuit Court of Appeals, appeals from district courts are taken on the original record without an appendix. *See* 11th Cir. R. 30-1. Here, the district court consolidated two cases below but entered separate final judgments in each case, and therefore citations to the record are to the district court dockets in both cases. References to No. 01-CV-3039 are by "(D1/__/__)." References to No. 02-CV-20556 are by "(D2/__/__)."

After obtaining the leases, National had engineering work and surveys conducted for site plans at a cost of $3,000 to $4,000 for each sign. (D2/35/13). Each of the signs could have been built within four to six weeks after issuance of a permit. (D2/35/11).

The City Denies National's Six Permit Applications

On December 20 and 26, 2001, National filed six applications with the City for permits to construct the six outdoor advertising signs. (D2/35/14 & Exs.9-14). Each application identified the land on which the sign would be built, the owner of the land, the size and height of the sign (65 feet high and 672 square feet in area), and that the sign would be used for advertising. (D2/9/12 & Exs.1-6). The proposed signs conformed with all state and federal laws governing the size, height, and spacing of signs (D2/35/20), but would have been in violation of the City Sign Code, which prohibits signs that advertise goods and services not available on the property where the sign was to be located.

On January 8, 2002, National's representatives appeared at the City's Building and Zoning Department and presented the six applications to inspectors of the City's electrical, public works, structure, and zoning departments for review and approval. (D2/35-14-15). Gaston Cajina, a Zoning Department reviewer, denied the applications. (D2/35/15). Cajina orally advised National's representatives that offsite outdoor advertising signs were not allowed in the C-1 zone where National sought to place the signs. He further stated that the signs were too tall to be built in other city zones that do allow offsite outdoor advertising. (D2/35/15 & D2/9/10-11). Miguel Gutierrez,

the City's Chief of Inspector Services, testified that Cajina's rejection of the permits was "tantamount to a denial because you are not going anywhere if you don't get the approval." (D2/35/67). He also acknowledged that the rejections included a notation "'do not issue permits as per administration.'" (D2/35/67).

According to the City's Building Official, José Ferras, and the City's zoning administrator, if a single reviewer rejected a permit application, no one within the Building Department would issue the permit, not even the Building Official. (D1/76/6; D2/45/Ex.14/33-34, 40, 49 & D2/45/Ex.9/50-51). Ferras testified that the Building Official had no authority to override a rejection by the Zoning Department. (D1/76/7; D2/45/Ex.14/33-35). He further testified that the Sign Code in place when National filed its applications "prohibited off site advertising within C-1 zones," and that had he been asked to approve the applications, he would not have because the Zoning Department had rejected them. (D2/61/44/48). Given the plain language of the ordinance prohibiting the signs at issue and the fact that City officials had made it clear that pursuit of administrative appeals, if any were available, would be futile, National did not appeal the denial of its permits. (D2/35/32).

The City's Sign Code Prohibited the Signs Which National Sought to Build

The Sign Code in effect at that time explicitly prohibited the granting of a variance for an outdoor advertising sign. Section 925, which contained the general requirements and limitations applicable to signs, expressly stated that "no variance from these provisions is permitted." (D1/94/Ex.1/368). The existence of this provision makes it

patently clear that there is no appellate or other remedy available, notwithstanding the Eleventh Circuit's finding that National must exhaust its administrative remedies before making its facial challenge.

The Sign Code consists of many different sections of City of Miami Ordinance 11,000, as amended, the City's general Zoning Ordinance. (D1/9-Exs.1&2 & D1/94). National redacted the Zoning Ordinance to show only those sections regulating outdoor advertising and filed that with the district court at the summary judgment hearing. (D1/158). That document is referred to by National as the "Sign Code." (App. 107). The notation "Sign Code, § ___" refers to a section within the Zoning Ordinance that regulates outdoor advertising.

National filed this action on February 21, 2002, claiming that it had leased six pieces of private property in C-1 commercial zones of the City of Miami; that under the leases it was entitled to construct, operate, and maintain offsite outdoor advertising signs; that it had applied to the City of Miami for permits to construct, operate, and maintain the signs, and that the City had denied the applications because the City's Sign Code prohibited offsite signs in the City's C-1 commercial zones. (D2/1). The complaint further alleged that the Sign Code in place when National filed its permit applications was unconstitutional both facially and as applied to the permit applications at issue. (D2/1). The complaint asserted that the City's decision caused National harm because National was prevented from building the signs it planned to erect, and it also prevented National as well as potential advertisers from posting both commercial and noncommercial messages on the signs. (D2/1).

The City moved to dismiss the complaint arguing that National had no basis to contest its denial of applications for permits in C-1 zones because National had sought permits for billboards in "an area of the City where billboards have been prohibited," and the City allowed offsite outdoor advertising in other zones. (D2/18-6). In its motion to dismiss, the City did not argue that National's claims were not ripe. The district court denied the motion explaining that "If the Court were to adopt the position urged by Defendant, no plaintiff would have standing to challenge zoning prohibitions." (D2/30-2). In keeping with this Court's precedent, the district court held that the City's argument could not "shield the Sign Code from review. The City's denial of applications for speech permits constitutes a recognizable injury in fact that Plaintiff has standing to challenge." (D2/30-2) (citing *Clark v. City of Lakewood*, 259 F.3d 996, 1006-08 (9th Cir. 2001) (discussing standing doctrine in context of a permit/license scheme)).

Thereafter, beginning on February 13, 2003, with the deposition of the City's Building Official, Jose Ferras (D2-45-Ex.14), the City and National conducted extensive discovery. The parties filed cross summary judgment motions on March 3, 2003, supported by several depositions and declarations, including the testimony of Ferras and other City officials responsible for reviewing National's permit applications and supervising the Code's permitting scheme. (D2/44-48, 51 & D2/53-58).

The District Court Grants Summary Judgment for the City

On March 19, 2003, the district court consolidated this case with *National Advertising Co. v. City of Miami*, No. 01-3039 (S.D. Fla.) (D2/65), a case filed by National on July 11, 2001, after the City compelled property owners to remove National's existing nonconforming signs from their properties. In that action, as in the instant action, National alleged that the City's Sign Code was unconstitutional and could not be enforced.

On September 25, 2003, the district court entered summary judgment for the City in Case No. 01-3039, the action that sought to prevent the City from compelling the removal of existing signs. That decision concluded that National did not have standing to attack provisions of the Sign Code that regulate noncommercial speech; that the restrictions the Sign Code imposed on noncommercial speech were constitutional, in any event; that the restrictions the Sign Code imposed on commercial speech were constitutional; and that the Sign Code's permit requirement was constitutional even though it contained no time limits for acting on a permit application because permit criteria were sufficiently specific. (D1/160). The district court entered a separate final judgment in Case No. 01-3039. (D1/159). National timely appealed. (D1/165).

The following day, September 26, 2003, the district court granted the City's motion for summary judgment in Case No. 02-20556, the instant case, challenging the City's denial of the permit applications. (D2/77). The basis for the decision was the court's finding that National's claims were not ripe, citing excerpts of the testimony of various City officials that National could have somehow pursued

review of the denial of its applications by the City's Building Official. (D2/77/1-15).

The district court then noted that if it had addressed the merits of National's claims, it would have ruled adversely to them because "this Court already has upheld the constitutionality of the Zoning Ordinance in National I, *National Adver. Co. v. City of Miami*, No. 01-3039-CIV-KING, [287] F. Supp. 2d [1349] (S.D. Fla. Sept. 25, 2003)." (D2/77-3).

Then, inconsistently with its own holding that the merits of the claims could not be reviewed, the Court entered final summary judgment against National on the merits of all claims instead of dismissing them for lack of ripeness. (D2/78). National timely appealed. (D2/79).

The Eleventh Circuit Holds that National Should Have Pursued Futile Administrative Remedies

The Eleventh Circuit affirmed, holding, "In this case, we decide whether a billboard company's challenge to a City's sign permitting procedure is ripe for judicial review." (App. 1). The Eleventh Circuit acknowledged that National had filed applications for permits for the signs with the City and that the signs that were the subject of the application did not conform with the requirements of the City's Zoning Ordinance. (App. 3). Yet, the court held "it is clear that National never properly pursued its claim through the administrative process that the City's zoning ordinance made available to them (sic). National's claim is not ripe because it failed to obtain a final denial of its applications." (App. 6). "It would have been far easier, and quicker, for National to have exhausted administrative

remedies or received a final written denial of its application instead of rushing to the federal courts for relief." (App. 9).

In essence, the Eleventh Circuit held that even though the City's Sign Code expressly prohibited construction of the signs proposed by National and prohibited any variance or other deviation from the licensing scheme, National had applied for permits, and the City had rejected the permits because they sought to build nonconforming signs, National could not launch a facial attack on the constitutionality of the ordinance that requires National to obtain a permit to erect a sign on the private property that it had leased for that purpose.

The Eleventh Circuit relied on its decision in *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997), to support its conclusion. In *Digital Properties*, the City asserted that the plaintiff may have been entitled to obtain the requested permit under the ordinance at issue there. In stark contrast, the City of Miami has always maintained here that its ordinance expressly prohibited the private property use at issue, and, in fact, both the district court and the Eleventh Circuit found that the Code prohibited the signs under which National sought permits.

REASONS FOR GRANTING THE WRIT

I.

The Decision is Contrary to this Court's Decisions, Other Circuit Decisions, and Even Prior Eleventh Circuit Decisions that the Ripeness Doctrine Does Not Require Futile Acts

The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). In deciding whether a claim is ripe for adjudication or review, federal courts look primarily at two considerations: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Id.* In this case, National's claim was fit for judicial decision because National had manifested a clear intent to build specific signs on specific properties, it established that the City would not and could not grant permits for those signs, and the court's refusal to address National claims prevented National from exercising its right to display signs and left a facially unconstitutional ordinance in place, chilling the rights of parties not before the court.

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court held a takings claims under the Due Process Clause was not ripe because a developer who had been denied a permit failed to seek a variance from the regulation requiring denial of a permit. This Court has never extended the holding of *Williamson* to speech licensing claims under the First Amendment, however, and it should not do so now because the variance process, which is inherently infused with discretion, is antithetical to this

Court's holdings in First Amendment cases such as *Freedman v. Maryland*, 380 U.S. 51 (1965), and *Thomas v. Chicago Park District*, 534 U.S. 316 (2001), that speech licensing schemes must closely circumscribe the licensor's exercise of discretion to prevent immediate harm to First Amendment rights. Indeed, in *Dougherty v. Town of North Hempstead Board of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002), the Second Circuit expressly held that the *Williamson* ripeness test does not apply to a First Amendment claim.

As this Court held in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), "the loss of First Amendment freedom for even minimal periods of time constitutes irreparable injury satisfying the grant of a preliminary injunction." When, as here, a speaker brings an overbreadth challenge, "the presence of irreparable injury *turns* on whether the plaintiff has shown a clear likelihood of success on the merits" because "'[v]iolations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.'"[2]

In *Peachlum v. City of York, Pa.*, 333 F.3d 429 (3d Cir. 2003), the Third Circuit observed that the interplay between ripeness and First Amendment overbreadth doctrines had not been resolved by this Court: "Whether the absence of final adjudication by a municipal agency of

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[2] *Beal v. Stern*, 184 F.3d 117, 123-24 (2d Cir. 1999) (quoting *Elrod*, 427 U.S. at 373) (emphasis added); *see also Northeastern Fla. Chapter of Ass'n of Gen'l Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) ("[t]he only area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury is the area of *first amendment* and right of privacy jurisprudence"), *rev'd on other grounds*, 508 U.S. 656 (1993).

the validity of a city ordinance precludes judicial consideration of First Amendment challenges is one of first impression." *Id.* at 434. The plaintiff in that case failed to follow procedures that allowed an appeal from a sign permit denial. Nevertheless, the court held the claim was ripe because of concern that, even in the absence of a fully concrete dispute, the challenged ordinance would "tend to chill protected expression among those who forbear speaking because of the law's very existence." *Id.* at 434-35. The court recognized that this concern regarding a chilling effect "is particularly acute with regard to facial challenges to a statute or ordinance." *Id.* at 435.

Even outside the First Amendment context, this Court has held that "Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his [land] only if there is uncertainty as to the land's permitted use." *Palazzolo v. Rhode Island*, 533 U.S. 606, 619 & 622 (2001) (holding that takings claim was ripe for adjudication in light of the "unequivocal nature" of the regulations at issue and even though the defendant had not ruled on other possible uses of the property). The Court further held that: "While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Id.* at 620; *see also Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997) ("[b]ecause the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying [the] requirement that a landowner take steps to obtain a final decision about the use that will

be permitted on a particular parcel"); *Cienega Gardens v. United States*, 265 F.3d 1237, 1245 (Fed. Cir. 2001) ("*Palazzolo* recently reaffirmed the futility exception to the final decision rule").

In the specific context of a dispute exactly like this – the denial of an application of a permit to construct an outdoor advertising sign on a piece of private property where the zoning ordinance prohibits issuance of a permit for the same – the Eleventh Circuit itself held in *Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 351 F.3d 1112, 1117-19 (11th Cir. 2003), that the facial challenge to the zoning ordinance was ripe and then decided it. The court did not, as did the panel in this case, decline to consider the facial challenge because the plaintiff had failed to exhaust administrative remedies. To the contrary, the panel in *Clearwater* expressly held that the claim was ripe, which the court should have done here as well. The decision by the Eleventh Circuit is squarely inconsistent with the *Clearwater* decision, which faithfully applied the ripeness doctrine.

In this case, National was specific about its intended use of the property, invested in the design of signs and prepared architectural and other engineering plans depicting the signs to be built for these exact properties, and, thereafter, applied to the City for permits to build the signs. City employees summarily rejected the applications because the City's Zoning Ordinance prohibited construction of the signs that National intended to assemble. While other City employees may have had authority to review the denial of the permit applications, it is undisputed that no City employee had the authority to grant the permit applications. This is particularly true given that the ordinance itself prohibits a variance from being issued.

Thus, the issue presented by the City's complaint – that those aspects of the City's Zoning Ordinance regulating outdoor advertising were facially unconstitutional – was fit for judicial review.

Refusing to review National's permit applications inflicted and is continuing to inflict severe injury on National. Importantly, the Eleventh Circuit's ruling is also at odds with prior precedent of this Court, which, if not addressed, will result in further tension in First Amendment jurisprudence. Because the holding goes to the heart of a fundamental precept of National's constitutional rights, the Court should grant certiorari and reverse the decision below.

II.

The Decision is Contrary to this Court's Rule and that of Other Circuits that Exhaustion of Administrative Remedies is Not Required

The Eleventh Circuit, in essence, held that National must pursue putative administrative remedies before it can present a constitutional challenge to the City's Sign Code, stating: "It would have been far easier, and quicker, for National to have exhausted administrative remedies or received a final written denial of its application instead of rushing to the federal courts for relief." (App. 9). The panel held that without a "'binding conclusive administrative decision, no tangible controversy exists.'" (App. at 10) (quoting *Digital Properties*, 121 F.3d at 591).

The Eleventh Circuit's insistence that National exhaust administrative remedies before pursuing a facial challenge to the City's Sign Code is directly contrary to

this Court's holding that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 518 (1982); *see also San Remo Hotel, L.P. v. City & County of San Francisco, Cal.*, 125 S.Ct. 2491, 2508 (2005) (Rehnquist, C.J., concurring) (citing *Patsy* for the proposition that "plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 & n.11 (1981); *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on 42 U.S.C. 1983 and 28 U.S.C. 1343(3) – as they are here – we have not required exhaustion of state judicial or administrative remedies"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (plaintiffs need not even apply for permit before bringing action under section 1983); *Nussle v. Willette*, 224 F.3d 95, 97-98 (2d Cir. 2000) (holding that "as a general matter, exhaustion of state remedies, whether administrative or judicial, is not a prerequisite to maintaining an action under § 1983").

This Court has made particularly clear that exhaustion of remedies is not required for facial challenges contending that a speech licensing scheme lacks sufficient procedural and substantive guidelines to prevent its use to censor speech. *See, e.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56 (1988); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990); *see also Peachlum*, 333 F.3d at 436 ("a *facial* First Amendment challenge is not normally subject to administrative finality analysis under any circumstances"); *Dougherty*, 282 F.3d at 90 (plaintiff "suffered an injury at the moment the defendants revoked his permit . . . pursuit of a further

administrative decision would do nothing to further define his injury").

Here, National claimed that the City violated its First and Fourteenth Amendment rights and the rights of third parties not before the Court by adopting zoning regulations that prohibit the erection of signs without a permit and that lack specific substantive and procedural criteria to restrict the City's discretion to deny permits, and by denying National's permit applications under a void ordinance. In reaching its conclusion here, the Eleventh Circuit's decision departed from well-established precedent by requiring National to exhaust administrative remedies before presenting its facial constitutional challenge.

The Third Circuit recognized the Eleventh Circuit's error in *Peachlum*, 333 F.3d at 437, citing *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997), as contrary to its conclusion that "free speech claim[s] ha[ve] never been deemed subject to administrative finality doctrine by our court or any other court of appeals, and we do not now so hold."[3] In keeping with its well-reasoned precedent, this Court should do the same.

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[3] The Eleventh Circuit panel in the instant case expressly relied almost exclusively on *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997) as authority for its ruling in this case. In *Digital Properties*, the Eleventh Circuit refused to recognize that *Patsy* announced a settled rule and instead "assume[d]" that *Patsy* precludes imposing an exhaustion requirement," and then claimed that it simply was upholding dismissal of the case on ripeness grounds. *Id.* at 591 n.4. In the instant case, the Eleventh Circuit made no pretense that it was simply deciding the case solely on ripeness grounds, scolding National because it had not "exhausted administrative remedies." (App. 9). The Court should not tolerate such blatant disdain for settled precedent.

Even if an exhaustion requirement did apply here, this Court and the federal courts of appeal have held that any exhaustion requirement is waived if resort to the available proceedings would be futile. *E.g., Smith v. Robinson*, 468 U.S. 992, 1014 n.17 (1984); *Monahan v. Nebraska*, 687 F.2d 1164, 1168 (8th Cir. 1982); *Rhodes v. United States*, 574 F.2d 1179, 1181 (5th Cir. 1978). As discussed above, National established beyond doubt that its pursuit of administrative remedies would have been entirely futile, yet the Eleventh held "It would have been far easier, and quicker, for National to have exhausted administrative remedies or received a final written denial of its application instead of rushing to the federal courts for relief." (App. 9).

The panel's decision is also contrary to cases such as *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555 (2d Cir. 1990), in which the town contended that National's challenge of its sign ordinance could not be reviewed because the company had not exhausted administrative remedies. The Second Circuit rejected this argument, stating: "National was not required to exhaust administrative remedies since it challenged the ordinances as facially invalid." *Id. See also Maldonado v. Harris*, 370 F.3d 945, 953 (9th Cir. 2004) (challenge to outdoor advertising regulation was ripe where plaintiffs had articulated a concrete plan to violate the law in question, prosecuting authorities had communicated a specific warning or threat to initiate proceedings, and history showed part prosecution or enforcement under the challenged statute).

This Court should grant certiorari to bring the Eleventh Circuit in line with other circuits and, ultimately, with the rule established by this Court that exhaustion of administrative remedies is not required for First Amendment claims.

CONCLUSION

This case, together with the companion case, have made it impossible for outdoor advertising companies to challenge municipal speech licensing schemes that are facially defective. The result is not only that these companies are unable to maintain and build outdoor advertising signs, but that cities maintain vast, improper control over the speech on all outdoor signs through the vagueness of their regulations, which regulations have no palpable relationship to any necessary or legitimate traffic safety or other concern. Speakers other than outdoor advertising companies, particularly those engaged in noncommercial speech, have little or no ability to challenge such regulations. Only if this Court vigorously polices its own precedents to ensure that commercial speakers are not improperly denied access to federal courts can the First Amendment rights of noncommercial speakers be protected.

The petition for a writ of certiorari should be granted.

Dated: October 17, 2005

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15516

D. C. Docket No. 02-20556-CV-JLK

NATIONAL ADVERTISING CO., a Delaware corporation,

Plaintiff-Appellant,

versus

CITY OF MIAMI, a Florida municipality,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Filed MARCH 21, 2005)

Before EDMONDSON, Chief Judge, WILSON, Circuit Judge, and RESTANI*, Judge.

PER CURIAM:

In this case, we decide whether a billboard company's challenge to a City's sign permitting procedure is ripe for judicial review. Plaintiff-Appellant, National Advertising

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

Company ("National") appeals the district court's order granting final summary judgment in favor of Defendant-Appellee, the City of Miami. National, claiming that the City's refusal to grant National six permits to construct new billboards violated the First and Fourteenth Amendments to the United States Constitution, brought suit against the City. Because National never obtained an official rejection of its permit applications, we find that it failed to present the district court with a ripe case. We therefore affirm the district court's grant of summary judgment with instructions to dismiss the case without prejudice for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

National is a Delaware corporation and a wholly-owned subsidiary of Viacom Outdoor Inc., a corporation formerly known as Infinity Outdoor, Inc. National, a leader in the outdoor advertising industry, specializing in the leasing of billboards, has operated in the City of Miami for approximately forty years. National normally constructs its billboards on either leased or purchased property and then rents space on the billboards to advertisers. National operates more than forty outdoor advertising signs in various locations throughout the City of Miami. Most of National's billboards display commercial messages, however a few of them display non-commercial, public interest messages.

In December of 2001, against the backdrop of on-going litigation between National and the City,[1] National sought

[1] In addition to this action, National filed a preceding action against the City. That case, *National Advertising Co. v. City of Miami,*

(Continued on following page)

permits to erect seven new billboards on private property located in the City of Miami. Under the City's comprehensive zoning plan, six of the seven proposed billboards were to have been located in an area zoned "C-1, commercial zone." City zoning clerks did not issue permits to National because the billboards it sought to construct exceeded the zoning ordinance's height limits for signs. In addition, the clerk orally informed National's agents that billboards were not permitted in the C-1 zone.

On February 19, 2002, National filed this action alleging that the City denied their applications because the City's "Sign Code"[2] prohibited offsite signs in the City's C-1 commercial zone, in violation of the First Amendment. National further alleged that the City's "Sign Code" was constitutionally suspect because it failed to contain adequate procedural guidelines and vested excessive discretion in the hands of City officials to either approve or deny applications to construct signs.

After both parties conducted discovery, they filed cross summary judgment motions in March of 2003. The district court heard arguments for both cases in August of 2003. On September 25, 2003, the district court entered summary judgment for the City in *National* I and found that

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Case No. 01-03039-CV-JLK (*National* I), challenged the constitutionality of the City's Zoning Ordinance in its entirety. *National* I and *National* II were consolidated in the district court below. However, we ordered the cases to be briefed separately. In the instant case, we asked the parties to focus solely on the denial of National's permit applications.

[2] National makes frequent references to the City's "sign code." However, the City does not have a sign code, as such. The City does have, as required by Florida law, a comprehensive zoning code that regulates, among other things, signs and billboards.

the City's Zoning Ordinance was constitutional in all respects.[3] The following day, the district court granted the City's motion for summary judgment in this action. The district court held that National's claims were not ripe pursuant to our holding in *Digital Props., Inc. v. City of Plantation,* 121 F.3d 586 (11th Cir. 1997), because National had failed to obtain a written denial of its permit application. National appeals.

STANDARD OF REVIEW

We review the district court's order granting a motion for summary judgment *de novo.* We construe all facts and make all reasonable inferences in the light most favorable to the non-moving party. *Kesinger ex rel. Estate of Kesinger v. Herrington,* 381 F.3d 1243, 1247 (11th Cir. 2004). Under FED. R. CIV. P. 56, summary judgment is proper if the pleadings, depositions, and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

DISCUSSION

The jurisdiction of federal courts is limited. The constitution dictates that the power of the federal courts is constrained by the requirement that they consider only "cases" and "controversies." U.S. CONST. art. III, § 2; *see, e.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-60, 112 S. Ct. 2130, 2136, 119 L. Ed.2d 351 (1992); *Granite*

[3] We reversed the district court's entry of summary judgment in *National* I and remanded with instructions to dismiss for lack of subject matter jurisdiction after we found that subsequent amendments to the City's zoning code mooted National's claims.

State Outdoor Adver. Co. v. City of Clearwater, 351 F.3d 1112, 1116 (11th Cir. 2003). "This case-or-controversy doctrine fundamentally limits the power of federal courts in our system of government, and helps to 'identify those disputes which are appropriately resolved through judicial process.'" *Ga. State Conference of NAACP Branches v. Cox,* 183 F.3d 1259, 1262 (11th Cir. 1999) (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S. Ct. 1717, 1722 109 L. Ed.2d 135 (1990)). In addition to the textual constitutional constraints on the power of federal courts to decide cases, we also recognize important prudential limitations. *Granite State,* 351 F.3d at 1116 (citing *Bennett v. Spear,* 520 U.S. 154, 162, 117 S. Ct. 1154, 1161, 137 L. Ed.2d 281 (1997) and *Lujan,* 504 U.S. at 560). While the constitutional aspect of our inquiry focuses on whether the Article III requirements of an actual "case or controversy" are met, the prudential aspect asks whether it is appropriate for this case to be litigated in a federal court by these parties at this time. *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale,* 922 F.2d 756, 759-60 (11th Cir. 1991).

When determining if a claim is ripe for judicial review, we consider both constitutional and prudential concerns. In some circumstances, although a claim may satisfy constitutional requirements, prudential concerns "counsel judicial restraint." *See Digital,* 121 F.3d at 589 (quoting *Action Alliance of Senior Citizens v. Heckler,* 789 F.2d 931, 940 n.12 (D.C. Cir. 1986)). Our inquiry focuses on whether the claim presented is "of sufficient concreteness to evidence a ripeness for review." *Id.* Strict application of the ripeness doctrine prevents federal courts from rendering impermissible advisory opinions and wasting resources through review of potential or abstract disputes. *See id.*

Our ripeness inquiry requires a two part "determination of (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* (citing *Abbott Lab. v. Gardner,* 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515-16, 18 L. Ed.2d 681 (1967); *Cheffer v. Reno,* 55 F.3d 1517, 1524 (11th Cir. 1995)). When a plaintiff is challenging a governmental act, the issues are ripe for judicial review if "a plaintiff . . . show[s] he has sustained, or is in immediate danger of sustaining, a direct injury as the result of that act." *Hallandale,* 922 F.2d at 760. As the district court correctly noted, while it is true that our review of a suit's ripeness is at its most permissive in cases concerning putative violations of the First Amendment, *id.,* that requirement may not be ignored.

We have also recognized that the ripeness doctrine not only protects courts from abusing their role within the government and engaging in speculative decision-making, but that it also protects the other branches from judicial meddling. One of the "basic rationale[s]" for the ripeness doctrine is "to protect the [administrative] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Digital,* 121 F.3d at 590 (internal quotation marks and citations omitted). When a court is asked to review decisions of administrative agencies, it is hornbook law that courts must exercise patience and permit the administrative agency the proper time and deference for those agencies to consider the case fully.

Turning to the facts in this case, it is clear that National never properly pursued its claim through the administrative process that the City's zoning ordinance made available to them. National's claim is not ripe because it failed to obtain a final denial of its applications.

Although National's initial request for a permit was not granted by the clerks in Miami's zoning department, National never received a final, written denial of their applications. Our reasoning in *Digital* is directly on point. As we held there, "[a] challenge to the application of a city ordinance does not automatically mature at the zoning counter." *Digital,* 121 F.3d at 590.

In *Digital,* we upheld the district courts dismissal of Digital's First Amendment challenge to the constitutionality of the City of Plantation's zoning ordinance because Digital failed to present a ripe case or controversy. In that case, Digital sought to establish an adult book and video store in Plantation. Digital assumed that Plantation's zoning scheme unconstitutionally barred adult businesses from operating anywhere within the city. However, Digital applied for a building permit to remodel a pre-existing structure for the purpose of opening an adult business. At the time Digital applied, they assumed their application would be rejected. Therefore, when an "Assistant Zoning Technician" did not immediately grant its permit, Digital filed suit in federal court alleging that Plantation's zoning scheme was unconstitutional, both facially and as applied. "Digital contended that [the zoning technician's] statement impaired its constitutional rights and constituted injury-in fact." *Id.* at 589. Because Digital never obtained an actual denial of their application, the district court dismissed the suit without prejudice for lack of subject matter jurisdiction, and we affirmed that decision. *Id.* at 591.

In this case, as in *Digital,* National "at a minimum . . . had the obligation to obtain a conclusive response from someone with the knowledge and authority to speak for the City regarding the application of the zoning scheme" to National's permits. *Id.* at 590. While there is some dispute

why the City did not grant National's initial application, National failed to demonstrate that their application was conclusively *denied.* A zoning clerk's verbal statement or written notation on National's application that its proposed billboards were "too tall" or "in the wrong zone" is not conclusive evidence of a denial and does not amount to evidence of a dispute of "sufficient concreteness" for judicial review. *Id.* at 589. "Without the presentation of a binding conclusive administrative decision, no tangible controversy exists." *Id.* at 590.

The necessity of a "binding conclusive administrative decision" to ensure that the facts of a case are mature enough to permit meaningful review is amply demonstrated by this case. National has at various times (including during oral argument) claimed both that Miami's zoning ordinance is too vague for it to know what is required to get a permit and that it did not obtain a written denial because it was certain that its application would be denied. Conversely, the City has alleged that National could have pursued a number of administrative options to protest its denial or it could have merely fixed specific deficiencies in the applications they presented.[4] It is precisely for this reason that without a "binding conclusive administrative decision, no tangible controversy exists." *Id.* As this case currently stands, a court is incapable of determining *if*, let alone why, National's applications were denied. Without that crucial information, it

[4] It is relevant to note that National originally applied for seven permits. They were all initially rejected because the proposed billboards were too tall. Later, National resubmitted an application for a billboard that conformed to the height requirement in an area zoned C-2. The city granted National a permit to construct the billboard.

would be impossible to determine if the City's zoning ordinance violates the constitution. As in *Digital*, National's "erroneous presumptions and impatience led it to rush to the courthouse and present an insufficiently concrete claim." *Id.* at 591.

Having determined that National's claims are not fit for judicial review at this time, we turn to the second part of our inquiry: the hardship to the parties of withholding court consideration. We agree with the district court that National has failed to produce evidence demonstrating that it would sustain undue hardship as a result of withholding court consideration. It would have been far easier, and quicker, for National to have exhausted its administrative remedies or received a final written denial of its application instead of rushing to the federal courts for relief.

CONCLUSION

We agree with the district court that National fails to present an actual case or controversy that is ripe for judicial review. Therefore, we affirm the district court's entry of summary judgment. However, we instruct the district court to dismiss the case without prejudice, so that National may re-file the case if it becomes ripe at some later date.

AFFIRMED WITH INSTRUCTIONS.

United States Court of Appeals
For the Eleventh Circuit

No. 03-15516

District Court Docket No.
02-20556-CV-JLK

NATIONAL ADVERTISING CO., a Delaware corporation,

Plaintiff-Appellant,

versus

CITY OF MIAMI, a Florida municipality,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

(Filed Mar. 21, 2005)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: March 21, 2005
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

ISSUED AS MANDATE

MAY 31 2005

U.S. COURT OF APPEALS
ATLANTA, GA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NATIONAL ADVERTISING COMPANY,

Plaintiff,

v.

CASE NO. 02-20556-CIV-KING

CITY OF MIAMI,

Defendant. /

MEMORANDUM OPINION GRANTING SUMMARY JUDGMENT

(Filed Sep. 26, 2003)

National Advertising Company, mistakenly believing that the permitting experts they employ to apply for billboard permits, had laid the essential predicate to enable their lawyers to file a constitutional challenge to the City of Miami Zoning Ordinance, filed this suit on February 21, 2002. In National's rush to the courthouse, they neglected to obtain a denial of the six permit applications they had partially processed through the City of Miami Building and Zoning Department. Waiting only to hear from a zoning clerk "he said for my future benefit, signs are not allowed in the C-1 zone. If it had been in the C-2 zone, the applications we submitted were for signs that were too tall for that zone."[1] After receiving this

[1] Testimony of Joseph Howard Little, Director of Real Estate for Florida, Georgia and the Carolinas for Plaintiff National Advertising Company testifying regarding the process National utilized in submitting the applications to the City on December 26, 2001:

(Continued on following page)

Q. After the applications had been submitted to the City of Miami, what was the next step in attempting to obtain permits for these seven locations?

A. In January, we went down to the building department, City Hall, and walked the applications through the process.

Q. If you would explain to the Court, what is that process? What do you do to push the application through?

A. Each packet gets a registration number. You show up in the morning and you take it through several of the various stations that the building department has, electrical, public works, structure and zoning.

Q. Did you obtain approvals in that process for each of the applications that were submitted?

A. Of those six we took them through each of the stations and obtained approvals up until we came to the zoning station, the sign department.

Q. At the zoning station, what happened there?

A. In each of the instances they were denied. Mr. Cajina denied them.

Q. Did he explain to you why they were being denied?

A. He did on the first packet that I took. He said for my future benefit signs are not allowed in the C-1 zone. If they had been in the C-2 zone, the applications we submitted were for signs that were too tall for that zone.

* * *

Q. After you had gotten the six applications denied, did you then submit the seventh application?

A. Yes, it was submitted to the City of January 9.

Q. What action, if any, did the City take with respect to the seventh sign application?

A. At that time it took no action.

Q. The seventh sign application, was this for a sign in a different type of zone other than the six signs?

A. Yes, it was for a sign in a C-2 zone. It appeared to me that it conformed to all aspects of the ordinance at the time and should have been issued.

(Tr. of the Evidentiary Hr'g at 14, 15 and 16, 08/28/02.)

rejection by the intake clerk during the walk through of the permit applications on January 8, 2001, National, without attempting to present the matter to the Building Official for consideration, or obtaining the written denial from the Building Official, went to their lawyer's office to commence premature preparation of this lawsuit.[2] This rush to the courthouse without making any effort to present the matter to the Building Official for approval or denial, and failing to get from the Building Official a final denial of the six building permit applications, constituted a fatal error mandating denial of the relief National here seeks. By treating a routine rejection by a zoning clerk of the billboard height, together with taking the clerk's volunteered words of advise [sic] for the future submission of the sign permit applications as a *denial,* National has failed in a very substantial and critical manner, to follow the law and thus is precluded from raising any constitutional issue or proceeding with any lawsuit without first meeting the basic requirement of a denial of a permit. Moreover, even if this Court were to address National's arguments on the merits, this Court has already upheld the constitutionality of the Zoning Ordinance in its Memorandum Opinion Granting Summary Judgment for the City, entered in National I, *National Adver. Co. v. City of Miami,* 287 F.Supp.2d 1349, 2003 WL 22455323 (S.D. Fla. 2003).

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[2] Interestingly enough, the seventh application applied for on January 9, 2002, apparently met the qualifications and was granted. National Advertising Company did not see fit to resubmit the other six permit applications that had been rejected for further consideration. Had they resubmitted the applications and had they been granted, this entire lawsuit would have been avoided.

I. Factual Background

Plaintiff National Advertising Company is a Delaware corporation and a wholly owned subsidiary of Viacom Outdoor Inc., a corporation formerly known as Infinity Outdoor, Inc. National is in the business of erecting and maintaining billboard signs on property it leases. According to its own statements, National maintains both commercial and noncommercial messages on billboards that are located throughout the City of Miami.

On March 8, 1990, pursuant to section 166.011 *et seq.*, Florida Statutes and Sections 3(4), 14, & 72 of its City Charter, Defendant City of Miami adopted Ordinance No. 11,000 (the "Zoning Ordinance") that divided the City into 24 geographical areas and specified regulations applicable to property located within each area. National alleges that the Zoning Ordinance changed the City's zoning classifications and reclassified certain zones as Restricted Commercial ("C-1"). According to National, these reclassified zones had the effect of making "some or all of the offsite signs in the effected zones nonconforming with the Zoning Ordinance."[2] On or about March 28, 1991, pursuant to Ordinance No. 10863, the City adopted section 107.2.2(a) of the Zoning Ordinance, which provides as follows:

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[2] For purposes of the instant case, National has billboard signs, or has attempted to obtain permits for signs, on property located in the following areas: (1) Restricted Commercial ("C-1"), (2) Liberal Commercial ("C-2"), (3) Central Business District ("CBD"), (4) Martin Luther King Boulevard Commercial District ("SD-1"), (5) Design Plaza Commercial-Residential District ("SD-8"), and (6) Latin Quarter Commercial-Residential and Residential District ("SD-14"). (01-3039-CIV Compl. ¶ 17; 02-20556-CIV Compl. ¶ 13.)

> In any district other than residential, any sign, billboard, or commercial advertising structure which constitutes a nonconforming characteristic of use may be continued, provided no structural alterations are made thereto subject to the following limitations on such continuance: (a) Any such sign except a roof sign shall be completely removed from the premises within five (5) years from the date it became nonconforming.

The Zoning Ordinance further provides that "[n]onconforming characteristics of use shall be construed as including those where the nonconformity was created by ordinance adoption or amendment, as provided at section 1101.1, as well as those where nonconformity was created by public taking or court order, as provided at section 1101.2." (Zoning Ord., § 1107 at 424.)

In December 2001, National applied for six sign permits with the City of Miami's Building and Zoning Department.[4]

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[4] On December 21, 2001, National applied for the following three sign permits:

(1) Permit No.: 010022180-sought to construct "a Billboard Sign" at 950 N.W. 22nd Avenue, Miami, Florida.

(2) Permit No.: 010022178-sought to construct a "sign" at 1073 Spring Garden Road, Miami, Florida.

(3) Permit No.: 010022176-sought to construct an "advertising display" at 301 N.W. 9 Street, Miami, Florida.

On December 26, 2001, National applied for three more permits:

(1) Permit No.: 010022233-sought to construct an "advertising display" at 670 N.W. 44 Street, Miami, Florida.

(2) Permit No.: 010022230-sought to construct an "advertising display" at 5245 N.W. 7 Street, Miami, Florida.

(3) Permit No.: 010022231-sought to construct an "advertising display" at 1330 N.W. 2 Court, Miami, Florida.

(Continued on following page)

Miguel Gutierrez, Chief of Inspector Services for the City of Miami Building Department, testified on August 28, 2002, and explained the process to obtain a building permit within the City of Miami as follows:

> You come in with an application. You go to the permit counter. They review the application, the licenses of the qualifier, the address, all the pertinent information. They issue you a plan number, a process number. With that process number, if it's going to be a walk through permit, you go to the walk through desk. You sign in there. You wait for all the reviewers to call you. You go see a reviewer that is needed for that particular job. After you get all the approvals you come back to the permit counter. You are issued a permit number. You go to the cashier and you pay and then you have a permit.

(Tr. of Prelim. Inj. Hr'g at 63:19-64:4, 08/28/02.) The following month, National filed for an additional seventh permit on a property located in a C-2 zone. That application was granted on March 5, 2002.

Jose L. Ferras, the Building Official for the City of Miami, testified about the walk through process as follows:

> When an applicant comes through the City of Miami, depending on the particular job code, . . . their application would be reviewed by different departments. In the particular case of the sign applications or the sign permit, we have an electrical department that reviews for the electrical

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On January 9, 2002, National applied for Permit No.: 025004374 for the property located at 3445 N.W. 27th Avenue. This property was zoned as a C-2 district and billboards were allowed in such a zone.

> requirements. We have a historical department that reviews for the historical requirements. We have a public works department that reviews for the public works requirements, structural, which is my department, reviews for the structural requirements, and then sign, which is zoning, that reviews for the zoning requirement.

(*Id.* at 28:3-13.) Ferras then explained the grievance process available to the applicant in the event an applicant disagrees with the recommendation of any department:

> A. When a rejection occurs on one or multiple departments, the rejection description or notice is given back to the applicant for them to go ahead and correct the items that are improperly submitted or not accepted by the departments.
>
> * * *
>
> A. If the applicant disagrees with one of the rejections of a department, normally they go and address it directly with the department head administrator or director, and try to solve their problems at that level. If they don't, then they would possibly submit their dispute in writing to me.
>
> Q. As Building Official?
>
> A. As Building Official.
>
> Q. If the applicant did submit the dispute in writing to you as Building Official, what would happen?
>
> A. If they disagreed with a department and they felt that they were right or had a valid point, I would then try to get the departments

> together and try to mitigate or resolve this problem at a local level.
>
> Q. And if you could not resolve it at a local level, what would be the next step, if any?
>
> A. The next step from then would be that they possibly take me to the Board of Rules and Appeal to appeal my decision.

(Tr. of Prelim. Inj. Hr'g at 28:21-24, 29:3-19, 10/28/02.)

Finally, on direct examination, Ferras testified that in his capacity as Building Official, he has the ultimate authority to deny or grant a permit:

> Q. As the Building Official, do you have the final and exclusive authority to deny a building permit application?
>
> A. I do.
>
> Q. Can the zoning department deny an application for a building permit?
>
> A. The zoning department can reject an application, but they have no authority, under my permit building application, to deny the application.
>
> Q. This would be true for the other departments within the City of Miami as well, for instance, Public Works?
>
> A. That's correct.

(Tr. of Prelim. Inj. Hr'g at 23:14-24, 10/28/02.) Similarly, Gaston Cajina, the zoning inspector who reviewed National's applications, testified as follows:

> Q. As zoning inspector do you have authority to deny a building permit?

A. No.

Q. As zoning inspector do you have the authority to grant a building permit?

A. No.

Q. Who has the authority to grant a building permit?

A. The Building Official.

Q. Does the Building Official also have the authority to deny a building permit?

A. Yes, it does.

Q. Is he the only person within the City of Miami who can deny a building permit?

A. That's correct.

(Tr. of Prelim. Inj. Hr'g at 70:24-71:12, 08/28/02.)

In its Complaint, Plaintiff alleges that on January 8, 2002, after walking through the six applications filed in December 2001, they were "denied" orally by the zoning clerk to whom the applications had been submitted. The lawyers have used the terms "rejection" and "denial" interchangeably. In its January 9, 2003, Order Denying Plaintiff's Motion for Preliminary Injunction, this court held that "[h]ere, the record shows National's six building permits were *not* denied by the only person who had legal authority to deny them-the Building Official." The Eleventh Circuit affirmed this Order on September 22, 2003. Thus, for purposes of this opinion, this Court finds that the zoning inspector, as per the testimony of the Building Official, has the authority to "reject" an application that can subsequently be resubmitted. The zoning inspector,

however, does not have the authority to "deny" an application; only the Building Official can do so.

Joseph H. Little, Director of Real Estate in the Southeast for Viacom Outdoor, Inc.,[8] that he personally walked through two of the six permit applications and that the other four applications were walked through by Defendant's employees Mark Lipman and Tony Chavez. (Tr. of Prelim. Inj. Hr'g at 24:19-25, 08/28/02.) According to Little, as they were walking the applications through, they obtained approvals from each of the departments until they arrived at the zoning department. (Tr. of Prelim. Inj. Hr'g at 15:2-13, 08/28/02.) Little testified that Gaston Cajina "denied" the applications stating that "for [Little's] future benefit signs are not allowed in the C-1 zone. If they had been in the C-2 zone, the applications we submitted were for signs that were too tall for that zone." (Tr. of Prelim. Inj. Hr'g at 15:12, 15-18, 08/28/02.) Chavez and Lipman, the two individuals who walked through the other four permit applications for National, both stated in their respective depositions that Cajina "rejected" the applications. (Chavez Dep. 42:11-43:16; Lipman Dep. 48:24-49:1.) According to Chavez, Cajina was mute, "he got up, went to the computer printout, got it back and handed it to me and says [sic] you have been rejected, read it." (Chavez Dep. 42:20-43:5) Lipman stated that he did not remember exactly what Cajina said, but that "it had something to do with the height or something . . . but for whatever reason he said because of that, I cannot accept this permit and it is rejected." (Lipman Dep. 49:3-11.)

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[8] As previously stated, Plaintiff National Advertising, Inc., is a wholly owned subsidiary of Viacom Outdoor, Inc. *See supra* p. 1.

The acts and statements described above clearly indicate that the permit applications were simply rejected by clerks and were not *denied* by the only person who had authority to deny with finality a building permit, namely, the Building Official, head of the Building and Zoning Department. This Court has previously so ruled in its Order of January 9, 2003 denying National's application for preliminary injunction. Plaintiff appealed this Court's denial of preliminary injunction and the Eleventh Circuit Court of Appeals on September 22, 2003 affirmed this Court decision.

On February 21, 2002, after the permit applications were rejected by the clerk, National filed its three-count Complaint against the City in this case ("National II"), alleging that (1) the City abridged the First Amendment by acting under a void Code that discriminates against Noncommercial Speech, (2) the City abridged the First Amendment by Acting under a licensing scheme that lacks procedural safeguards, and (3) the City abridged the First Amendment by discriminating against Commercial Off-Premise Speech.

This Court entered its Memorandum Opinion and Order Granting Summary Judgment for the Defendant City of Miami on September 25, 2003 in National I. By that decision, the Court determined that National's First Amendment challenges to the Building and Zoning Code of the City of Miami were meritless and upheld the constitutionality of Zoning Ordinance No. 11,000.

The Plaintiff National Advertising Company can, of course, submit again the six building permits here at issue and obtain a final acceptance or denial by the Building Official of the City's Zoning Department.

II. Procedural Posture

A. *National II*

On February 21, 2002, National filed the case referred to as National II[6] in response to the City's rejection of the six permit applications National submitted in December, 2001.[7] National filed its Motion for Preliminary Injunction simultaneously with its Complaint. This Court held an evidentiary hearing on the injunction on August 28, and October 28, 2002. On January 9, 2003, this Court denied the injunction on the basis that National did not meet its burden of showing substantial likelihood of success on the merits, and National appealed on January 22, 2003. On September 22, 2003, the Eleventh Circuit affirmed this Court's January 9, 2003, Order denying National's Motion for Preliminary Injunction.

On March 3, 2003, pending resolution of National's interlocutory appeal, the parties filed Cross-Motions for Summary Judgment along with numerous Motions to Compel various discovery, a Motion to Exclude, and a

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[6] This cause is before the Court upon the parties' Cross-Motions for Summary Judgment filed March 3, 2003. (01-3039-CIV DE # 47, 53.) On April 3, 2003, Plaintiff National Advertising ("National") filed its Response to the City's Motion. On April 7, 2003, Defendant City of Miami ("the City") filed its Response to National's Motion. On April 11, 2003, the City filed its Reply to National's Motion. On April 14, 2003, National filed its Reply to the City's Motion.

[7] As stated above, National filed the case referred to as National I Case No.: 01-3039-CIV-King, on July 11, 2001, in response to the City's enforcement proceedings against property owners with whom National had leases to erect and maintain billboards. On July 7, 2003, the parties filed Cross-Motions for Summary Judgment (01-3039-CIV DE 112, 116) relating to the factual allegations underlying National I. In order to avoid confusion, the Court has addressed the National I motions in a separate order.

Motion to Strike. The Court has ruled on all of the pending motions in National II except for the parties' Cross-Motions for Summary Judgment, which are currently pending before this Court.

B. *Consolidation of National I and National II under Case No. 01-3039-CIV-King*

On March 19, 2003, upon the parties' Joint Motion, this Court consolidated both National and National II and identified the consolidated action as *National Adv. v. City of Miami*, Case No. 01-3039-CIV-KING. Thus, the Renewed Motion for Preliminary Injunction filed in National I on March 3, 2003, along with the parties' Cross-Motions for Summary Judgment filed in National II on that same date, are currently pending in the Consolidated Case.[8]

III. Analysis

Judge Middlebrooks set forth an observation in one of his opinions regarding the recent trend of First Amendment litigation involving billboard companies and municipal ordinances. In *Florida Outdoor Adver. v. Boca Raton*, he was confronted with a challenge to a municipal ordinance by a billboard advertising company and he stated as follows: "[t]his is another in series of cases brought by

[8] Moreover, on July 1, 2003, National filed its Motion for Discovery Status Conference, for Protective Order Limiting or Ending Discovery, and for Reconsideration of Prior Discovery Orders. Finally, on July 3, 2003, the deadline for motion practice as set forth in this Court's Pretrial Conference Order, the parties filed their second Cross-Motions for Summary Judgment, along with the City's Motion for Order Requiring Compliance with Discovery, and for Sanctions. All of these recently filed motions are also currently pending before this Court.

outdoor advertising companies against municipalities alleging violation of the First Amendment. The now familiar strategy is to apply for a permit for erection of a billboard knowing full well that the permit will be denied under the city's existing sign ordinance but also aware that the ordinance is subject to legal attack." Case No.: 01-8504-CIV-MIDDLEBROOKS (S.D. Fla. Jan. 14, 2003). The instant action presents a similar constitutional challenge and strikingly similar factual pattern.

In this case, the City argues that it is entitled to summary judgment on three grounds: (1) National has failed to present an actual case or controversy ripe for judicial review under Article III, § 2, clause 1, U.S. Const.; (2) National failed to establish standing; and (3) National's claims are moot. In this Order, the Court will address the City's argument that National's claims are not ripe for judicial review. According to the City's argument, this Court should apply the Eleventh Circuit's rationale in *Digital Properties, Inc. v. City of Plantation,* 121 F.3d 586 (11th Cir. 1997) to the instant case because:

> National, just like Digital, has "in its haste to preserve its perceived First Amendment rights, failed to present a mature claim for review." [*Digital,* 121 F.3d] at 590. National, like Digital, "did not pursue its claim with requisite diligence to show that a mature case or controversy exists." *Id.* at 590. National, like Digital, has not obtained final agency action. [Footnote omitted] National, like Digital, has shown no hardship from withholding judicial review at this time and requiring a final agency action. Thus, like Digital, National's claims are not ripe for judicial review.

In its Response, National argues that *Digital Properties* is distinguishable from the instant case, and that as a result it has the requisite standing to challenge the Zoning Ordinance in federal court. This Court disagrees.

Federal courts are courts of limited jurisdiction, pursuant to Article III, Section 2 of the United States Constitution in that the courts can only render decisions in actual cases and controversies. Thus, "[b]efore rendering a decision, . . . every federal court operates under an independent obligation to ensure it is presented with the kind of concrete controversy upon which its constitutional grant of authority is based. . . ." *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale,* 922 F.2d 756, 759 (11th Cir. 1991) (citing *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990)). The Eleventh Circuit has stated that "[t]he ripeness doctrine involves both jurisdictional limitations imposed by Article III's requirement of a case or controversy and prudential considerations arising from problems of prematurity and abstractness that may present insurmountable obstacles to the exercise of the court's jurisdiction, even though jurisdiction is technically present." *Johnson v. Sikes,* 730 F.2d 644, 648 (11th Cir. 1984). When determining whether a case is ripe, a court must specifically consider "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Digital Prop., Inc. v. City of Plantation,* 121 F.3d 586, 589 (11th Cir. 1997). In cases challenging a governmental act, the issues are fit for judicial review if "a plaintiff . . . show[s] he has sustained, or is in immediate danger of sustaining, a direct injury as the result of that act." *Hallandale Prof'l Fire Fighters,* 922 F.2d at 760. While this requirement is interpreted broadly in a First Amendment context, it cannot be ignored. *Id.*

In *Digital,* the Eleventh Circuit addressed whether a First Amendment challenge to a city's zoning code was ripe for judicial consideration. In that case, the plaintiff Digital Properties, Inc., sought to construct an adult video and bookstore in a general business district that allowed for bookstores, newsstands, and theater and motion picture houses. *Digital,* 121 F.3d at 587. Digital's representatives attempted to file copies of the remodeling plans with the city. *Id.* at 588. At the zoning department, the representatives spoke with an assistant zoning technician who, upon hearing the nature of the business Digital sought to open, allegedly told the representatives that the City did not allow such use and refused to accept the plans. *Id.* The zoning technician further instructed the representatives to speak with the city's Director of Building and Zoning because "the scope of her job did not encompass accepting building plans over the counter." *Id.* at 588-89. Digital never contacted the Director, but instead, filed suit in district court five days later. *Id.* at 589. Upon the city's motion, the district court dismissed Digital's action, and Digital appealed. *Id.* On appeal, the Eleventh Circuit affirmed the lower court's ruling and held that the district court lacked subject matter jurisdiction over Digital's claim because it was not ripe, and further noted as follows:

> Upon reaching the zoning department, . . . Digital waited only long enough to have one supervisory employee "confirm" its assumption. At a minimum, Digital had the obligation to obtain a conclusive response from someone with the knowledge and authority to speak for the City regarding the application of the zoning scheme to Digital's proposal. [The technician's] alleged statement to Digital's representatives that "the City of Plantation does not allow such use,"

> simply is not sufficient to create a concrete controversy.

Id. at 590. Therefore, the Eleventh Circuit held that Digital's "action only constitutes a potential dispute, and this court has neither the power nor the inclination to resolve it." *Id.* 590-91.

Following the holding of the Eleventh Circuit in *Digital,* this Court finds that the instant case fails to present an issue that is ripe for judicial determination. National, like the plaintiff in *Digital,* not only failed to apprise itself of the administrative remedies available, but even failed to await the City's final denial of the permits. According to Juan Gonzalez, Zoning Administrator at the time National filed its permit applications, Cajina's rejection of the permit application did not constitute final action by the City. (Gonzalez Dep. at 4:4-20, 108:17-109:5.) Specifically, Gonzalez stated that the Building Official of the City of Miami is the person with the authority to deny issuance of a permit. (Gonzalez Dep. at 108:17-24.) Gonzalez indicated that Cajina's rejection of the permit applications is not the final rejection by the Zoning Department because the applicant could go to the zoning administrator for the zoning division in which the applicant is applying. (Gonzalez Dep. at 109:1-5.) In fact, according to Gonzalez, "[a] rejection by the zoning plan reviewer is given with the expectation that the property owner will correct any problems or deficiencies in the permit application and then return to the zoning plan reviewer for another review." (Gonzalez Decl. ¶ 5.)

Furthermore, Jose L. Ferras, the Building Official for the City of Miami, unequivocally stated at the Preliminary Injunction Hearing held on October 28, 2002, that rejection

by a department does not constitute denial of a permit because the Building Official is the only person who has the authority to grant or deny permits. *See supra* pp. 1285-86. Similarly, Cajina testified at the same hearing that as a zoning inspector he does not have the authority to grant or deny a permit because the Building Official is the only person within the City who has that authority. *See supra* pp. 1286-87. In fact, Lipman, one of the individuals who walked through two of the permits for National, stated in his deposition that "[i]t is my understanding that the zoning official works with the building official and is one of those stops along the way on permit approval in that process." (Lipman Dep. 47:11-14.) Lipman further stated that "[m]y understanding would be that any department could reject." (Lipman Dep. 46:11-12.) In response to that statement Lipman was asked "[i]s that an official denial of a building permit?" and he stated, "No. I would say an official denial is when we have something in writing that says its denied." (Lipman Dep. 46:13-17.) Therefore, this Court finds that the record is devoid of any evidence showing that National attempted to (1) discuss the zoning plan examiner's rejection of the permit applications with a supervisor in the Zoning Department or the Zoning Administrator, or (2) obtain a final decision by the Building Official of the City of Miami.

Moreover, besides seeking a final denial of the permit, National had other remedies available that could have led to a resolution of this case without costly and unnecessarily burdensome litigation. According to Gonzalez, National could have (1) revised the height and proposed location of the billboards, and/or (2) sought rezoning of the property. (Gonzalez Decl. ¶ 7.) In fact, National's seventh permit was granted in March 2003 because it sought to construct

the billboard in the C-2 zone where such structures are allowed. *See supra* note 4. The record before this Court shows that National did not avail itself of these remedies. Instead, Little himself testified before this Court that after receiving the rejections from zoning he immediately went to National's attorneys' office and left the permit applications there without taking the applications back to the City's Building Department. (Tr. of Prelim. Inj. Hr'g at 25:6-19, 8/28/02.) Moreover, Lipman stated that he had instructions from Little to simply walk the applications through the process, get any denials in writing and go home. (Lipman Dep. 46:2-6, 49:21-50:2.) Neither Lipman nor Chavez did what in their experience was normally done when an application was rejected by a department; namely attempt to work the problem out with the government officials. (Lipman Dep. 49:12-50:2; Chavez Dep. 43:18-44:18.)

This case represents National's rush to the courthouse to file a Complaint in a case where the City did not have the opportunity to make a final decision on the permit applications in question. As a result, the City is being dragged through expensive and contentious litigation on the oral conclusion of a zoning plans examiner that National's six permit applications did not comply with the Zoning Ordinance. Therefore, this Court finds that the instant case, as it relates to the rejection of the permit applications filed in December 2001, fails to present a ripe controversy because National failed to exhaust its remedies and, like the plaintiff in *Digital*, failed to obtain "a binding conclusive administrative decision."

Finally, National has also failed to produce evidence illustrating how its exhaustion of administrative remedies or its attempt to obtain a final agency determination

would force the parties to endure hardship. Thus, this Court finds that National's claims, originally filed in National II and premised on the City's denial of the six permit applications filed in December 2001, do not present an actual case or controversy that is currently ripe for judicial review.

IV. Conclusion

Accordingly, after a careful review of the record and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that the City's Motion for Summary Judgment be, and the same is hereby, GRANTED. It is further

ORDERED and ADJUDGED that National's Motion for Summary Judgment be, and the same is hereby, DENIED.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 26th day of September, 2003.

/s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE
SOUTHERN DISTRICT
OF FLORIDA

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15593

D. C. Docket No. 01-03039-CV-JLK

NATIONAL ADVERTISING CO.,

Plaintiff-Appellant,

versus

CITY OF MIAMI,
MIAMI-DADE COUNTY, FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(Filed March 21, 2005)

Before EDMONDSON, Chief Judge, WILSON, Circuit Judge, and RESTANI*, Judge.

PER CURIAM:

In this case, we decide whether a billboard company's challenge to a City's zoning ordinance is rendered moot by

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

the subsequent amendment of the ordinance. Plaintiff-Appellant National Advertising Company ("National") appeals the district court's order granting final summary judgment in favor of Defendant-Appellee, the City of Miami. National brought suit against the City, claiming that the City's Zoning Code violated the First and Fourteenth Amendments to the United States Constitution by impermissibly infringing upon the free speech rights of National and its advertisers. We are convinced that amendments to the City's zoning code rendered this case moot and we therefore reverse the district court's grant of summary judgment with instructions to dismiss the case for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

In March of 1990, the City of Miami adopted a comprehensive Zoning Ordinance that is the subject matter of this suit. Ordinance No. 11,000 divided the City into 24 geographical areas and enacted a comprehensive scheme of regulations applicable to property located in each area. The ordinance was enacted with, among other goals, the purposes of "promot[ing] the public health [and] safety . . . provid[ing] a wholesome, serviceable, and attractive community" and "increas[ing] traffic safety." Miami, Fla., Zoning Ordinance § 120 (1991). While the zoning code governed all aspects of land use within the Miami City limits, some regulations focused on billboards and signs throughout the City. However, the City provided a grace period of five years for advertisers, like National, with existing structures already erected to remove nonconforming billboards.

National is a Delaware corporation and a wholly-owned subsidiary of Viacom Outdoor Inc., a corporation formerly known as Infinity Outdoor, Inc. National is a leader in the outdoor advertising industry, specializing in the leasing of billboards, and has operated in Miami for approximately forty years. National normally constructs its billboards on either leased or purchased property and then rents space on the billboards to advertisers. National operates more than forty outdoor advertising signs in various locations throughout the City of Miami. Most of National's billboards display commercial messages, however a few of them display non-commercial, public interest messages.

After nearly a decade of non-enforcement of the Zoning Ordinance's billboard provisions, in April 2001 the City commenced enforcement by issuing notices to property owners who had nonconforming billboards on their property. The notices advised the property owners that they were in violation of the City's zoning code and told the owners to correct the violations by May 2001, or face fines and other penalties brought by the City's Code Enforcement Board. On July 10, 2001, the Miami City Commission authorized the City manager to arrange a Commission meeting where the City Commission could make findings that would justify the City's removal of billboards without notice and to hold outdoor advertising companies in contempt of the City Commission. The next day, National filed this action in district court.[1] While

[1] In addition to this case, National also filed a second suit against the City. That case, *National Advertising Co. v. City of Miami*, Case No. 02-20556-CIV-KING ("*National* II"), was filed on February 21, 2002 in response to the City's rejection of seven permit applications to construct billboards. *National* I and *National* II were consolidated in the district

(Continued on following page)

National engages in predominantly commercial advertising, its complaint invoked the free speech overbreadth doctrine and alleged that the City's Zoning Ordinance discriminated against non-commercial speech in violation of the First and Fourteenth Amendments, lacked procedural safeguards in violation of the First Amendment, and that the City's decision to begin immediate removal of signs violated Due Process and the First Amendment.

Shortly after filing its complaint, National moved for an injunction to prevent the City of Miami from acting to remove signs or enforce the ordinance. The district court denied National's motion for injunctive relief, and National appealed. In an unpublished opinion, *Nat'l Adver. Co. v. City of Miami*, 48 Fed. Appx. 740, 2002 WL 31054893 (11th Cir. Aug 27, 2002), we vacated the district court's denial of National's motion and remanded to the district court for further consideration. Thereafter, National amended its complaint, alleging three new claims. National asserted (1) that the City's refusal to stay the accrual of code enforcement fines during the pendency of litigation discriminated against National for its exercise of its First and Fourteenth Amendment rights, (2) that the discriminatory acts of the City and Miami-Dade County violated the First Amendment and the Equal Protection Clause, and (3) that the City and the County's lack of

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court below. However, we ordered the cases to be argued separately before this court. In this case we asked the parties to focus solely on the constitutionality of the zoning ordinance itself. In the companion case, *National* II, the parties were asked to discuss the issues related to the permitting process in its entirety.

procedural safeguards violate the First Amendment.[2] Additionally, National sought another injunction.

After National filed its first suit against the City, the City began the process of amending its zoning regulations pertaining to signs.[3] On January 5, 2002 the City published notice of its intent to amend the Zoning ordinance and those amendments were adopted on April 11, 2002. The amendments changed many aspects of the City's sign code but specifically clarified that non-commercial speech may be placed on any sign where commercial speech was permitted.

In September 2003, the district court entered an order granting summary judgment to the City of Miami and denying National's motion for summary judgment. The district court held that National lacked standing under the overbreadth doctrine to enforce the rights of non-commercial speakers. Additionally, the court held that, assuming National did have standing to enforce the rights of non-commercial speakers, the zoning ordinance did not violate the First Amendment.

STANDARD OF REVIEW

The City contends that the changes to the Zoning Code render National's claims moot. Mootness is the

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[2] Although National's amended complaint added the County as a party, the record makes no mention of appearances by the County and they did not appear before us on appeal.

[3] There is some dispute as to when the process of amending the City's zoning ordinance began. However, since we conclude that the City has no intention of re-enacting the allegedly unconstitutional segments of the zoning code, we need not decide what initially motivated the City's comprehensive overhaul of its entire zoning ordinance.

central issue in this case and "[w]e review the question of mootness *de novo*." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328 (11th Cir. 2004) (internal citations omitted). Furthermore, because the question of mootness is jurisdictional in nature, it may be raised by the court *sua sponte*, regardless of whether the district court considered it or if the parties briefed the issue. *Sannon v. United States*, 631 F.2d 1247, 1250 (5th Cir. 1980).[4]

DISCUSSION

We have long recognized that the Constitution limits the jurisdiction of federal courts. The United States Constitution, Article III, Section 2, provides that the judicial power of the United States federal courts shall extend only to "cases" and "controversies." *Coral Springs*, 371 F.3d at 1327 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 112 S. Ct. 2130, 2136, 119 L. Ed.2d 351 (1992)). The Article III case or controversy limitation on the jurisdiction of federal courts serves an important role in our constitutional separation of powers framework, *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1244 (11th Cir. 1998), and it is a fundamental principle of our form of democratic government that the role of courts is properly a limited one. Thus, we strictly observe the cases or controversies limitation. *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324, 82 L. Ed.2d 556 (1984).

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

Mootness is among the important limitations placed on the power of the federal judiciary and serves long-established notions about the role of unelected courts in our democratic system. By its very nature, a moot suit "cannot present an Article III case or controversy and the federal courts lack subject matter jurisdiction to entertain it." *Coral Springs*, 371 F.3d at 1328 (internal citations omitted). If a lawsuit is mooted by subsequent developments, any decision a federal court might render on the merits of a case would constitute an advisory opinion. *See id.; Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001); *Socialist Workers Party*, 145 F.3d at 1244. A change in the law, such as amending a zoning ordinance as here, or a change in other circumstances can give rise to mootness. We have held that "[w]hen a subsequent law brings the existing controversy to an end the case becomes moot and should be treated accordingly." *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000). In other words, federal courts lack jurisdiction to hear and decide cases where changes in the law have rendered the case moot.

Accordingly, we must decide whether the City of Miami's subsequent amendments to its zoning ordinance render National's legal challenges moot. If the zoning ordinance amendments have rendered this suit moot, then we must dismiss the case for lack of jurisdiction.

This Court and the Supreme Court have repeatedly held that the repeal or amendment of an allegedly unconstitutional statute moots legal challenges to the legitimacy of the repealed legislation. For example, in *Coral Springs* we noted that "[g]enerally, a challenge to the constitutionality of a statute is mooted by repeal of the statute." 371 F.3d at 1329. Similarly, in *Coalition for the Abolition of*

Marijuana Prohibition, we held that "when an ordinance is repealed by the enactment of a superseding statute, then the 'superseding statute or regulation moots a case.'" 219 F.3d at 1310 (quoting *Naturist Soc'y, Inc. v. Fillyay*, 958 F.2d 1515, 1520 (11th Cir. 1992)). Furthermore, the Supreme Court has many times held that amendments or revocation of challenged legislation renders the lawsuit moot and deprives the court of jurisdiction.[5]

National argues that the City of Miami's voluntary cessation of their allegedly unconstitutional conduct does not render National's challenge moot. National claims that this case falls within one of the important exceptions to the case or controversy limitations on federal courts'

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[5] We cataloged many of the Supreme Court decisions on this subject in our *Coral Springs* decision:

> *See, e.g., Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 474, 110 S. Ct. 1249, 1252, 108 L. Ed.2d 400 (1990) (holding that a Commerce Clause-based challenge to Florida banking statutes was rendered moot by amendments to the law); *Massachusetts v. Oakes*, 491 U.S. 576, 582-83, 109 S. Ct. 2633, 2637-38, 105 L. Ed.2d 493 (1989) (holding that an overbreadth challenge to a child pornography law was rendered moot by amendment to the statute); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103, 102 S. Ct. 867, 869, 70 L. Ed.2d 855 (1982) (*per curiam*) (holding that the challenge to a university regulation was moot because the regulation had been substantially amended); *Kremens v. Bartley*, 431 U.S. 119, 128-29, 97 S. Ct. 1709, 1715, 52 L. Ed.2d 184 (1977) (holding moot a constitutional challenge to a state statute governing the involuntary commitment of mentally ill minors, because the law had been replaced with a different statute); *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 415, 92 S. Ct. 574, 576, 30 L. Ed.2d 567 (1972) (holding moot a challenge to a Florida tax exemption for church property when the law had been repealed).

Coral Springs, 371 F.3d at 1329

jurisdiction because of the possibility that, if the court does not rule on the ordinance, the City will simply reenact the challenged ordinance at some later date. While our general rule is that repeal of a statute renders a legal challenge moot, an important exception to that general rule is that mere voluntary termination of an allegedly illegal activity is not always sufficient to render a case moot and deprive the federal courts of jurisdiction to try the case. "It has long been the rule that 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" *Sec'y of Labor v. Burger King Corp.*, 955 F.2d 681, 684 (11th Cir. 1992) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 897, 97 L. Ed. 1303 (1953)). For a defendant's voluntary cessation to moot any legal questions presented and deprive the court of jurisdiction, it must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (internal quotation marks and citations omitted). In other words, voluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction.[6]

National is correct in pointing out that when a defendant has voluntarily ceased its offending conduct we are reluctant to dismiss the case as being moot, particularly if there is affirmative evidence that the defendant is likely to return to its prior ways following our dismissal of the

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[6] Miami amended its sign code six months after being sued by National. Whatever impact this fact might have, it was not expressly argued by National. Furthermore, other evidence persuades us that Miami did not amend its sign code to deprive this Court of jurisdiction.

litigation. However, "governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Coral Springs*, 371 F.3d at 1328-29. Indeed, as we noted above, the cases are legion from this and other courts where the repeal of an allegedly unconstitutional statute was sufficient to moot litigation challenging the statute. *See also* 13A Wright et al., *Federal Practice and Procedure* § 3533.7 (2d ed. 2004) ("Courts are more apt to trust public officials than private defendants to desist from future violations.").

In sum, when a court is presented with evidence of a "substantial likelihood" that the challenged statute will be reenacted, the litigation is not moot and the court should retain jurisdiction. *Coral Springs*, 371 F.3d at 1329. However, in the absence of evidence indicating that the government intends to return to its prior legislative scheme, repeal of an allegedly offensive statute moots legal challenges to the validity of that statute. "Whether the repeal of a law will lead to a finding that the challenge to the law is moot depends *most significantly* on whether the court is sufficiently convinced that the repealed law will not be brought back." *Coral Springs*, 371 F.3d at 1331 (emphasis added). Therefore, National's reliance on *Nat'l Adver. Co. v. City of Fort Lauderdale*, 934 F.2d 283 (11th Cir. 1991) is misplaced. In that case, the City of Fort Lauderdale amended its sign code in response to a suit challenging the constitutionality of the statute. The City of Fort Lauderdale's conduct, including its motion to dismiss for lack of subject matter jurisdiction filed the day after its amendment took effect, "sufficiently convinced" us that if the suit was dismissed as moot, that the City would simply re-enact the previous version of its sign regulations. We

therefore held that the case was not moot, precisely because of the risk that the City might return to their previous course of conduct. *Fort Lauderdale*, 934 F.2d at 286. We are convinced that there is no similar risk in this case. The only evidence that National has presented in this case to suggest that the City might return to its previous version of the ordinance is the fact that the City has defended its ordinance. However, once the repeal of an ordinance has caused our jurisdiction to be questioned, National bears the burden of presenting affirmative evidence that its challenge is no longer moot. Mere speculation that the City may return to its previous ways is no substitute for concrete evidence of secret intentions.

National is also incorrect in suggesting that we should focus on the City's motivation in amending the code. The City's purpose in amending the statute is not the central focus of our inquiry nor is it dispositive of our decision. Rather, the most important inquiry is whether we believe the City would re-enact the prior ordinance. Again, there is no evidence in this case suggesting any risk that the City of Miami has any intention of returning to its prior course of conduct.

Given the legal framework for determining when subsequent events can moot a legal challenge, we apply those legal principles to the facts of this case. In April 2002, the City of Miami completely revised and amended its zoning ordinances, changing entirely the provisions of their code that were the gravamen of this suit.[7] Specifically, the

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[7] National spends a large portion of its brief arguing that the April 2002 amendments failed to cure the City's zoning code of constitutional infirmities in the permitting process. Those arguments are misplaced in this appeal. We address National's complaints regarding the permitting

(Continued on following page)

City's revised zoning ordinance mooted National's claims that the City impermissibly favored commercial speech over non-commercial speech. The new zoning ordinance altered completely the City's regulations pertaining to commercial and non-commercial speech. The amendments made clear that non-commercial messages would be permitted anywhere commercial messages were allowed. Additionally, the amendment contained a "substitution clause" that stated that "[a]ny sign allowed herein may contain, in lieu of any other message or copy, any lawful, non-commercial message, so long as the sign complies with the size and height, area, and other requirements." Finally, Ordinance 12,213 amended the City's definition of onsite signs to make it clear that all non-commercial messages were considered onsite. These amendments changed the zoning code so that the allegedly unconstitutional portions of the City's zoning ordinance no longer exist. As a result of these changes we would be incapable of granting National any of the relief requested in its original complaint and any decision we would render would clearly constitute an impermissible advisory opinion. Therefore, National's claims are moot.

While we refrain from deciding whether these changes would nullify *any* potential constitutional infirmities in the City's zoning ordinance, we do hold that the amendments rendered all the complaints raised by National in this suit moot. Whatever defects may remain in the City of

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process in this case's companion, *National* II. Additionally, because this case is a facial challenge to Miami's zoning ordinance, we need not address any issues related to whether National had acquired any vested rights prior to the amendments which mooted this claim. *Cf. Coral Springs*, 371 F.3d at 1333-1342.

Miami's zoning ordinance or other laws are not properly before us and we do not address them. As we have held, "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Geaneas v. Willets*, 911 F.2d 579, 584 (11th Cir. 1990).

CONCLUSION

Federal courts are courts of limited jurisdiction. Under our Constitutional separation of powers framework, it is essential that all three branches of government strictly observe the limitations on their proper dominion. Thus, out of respect for their limited role within our government, federal courts have long refused to issue advisory opinions. Additionally, we have repeatedly held that moot cases fail to meet the important requirement that courts only address active cases or controversies. In this case, the City of Miami's amendments to the its zoning code effectively rendered moot National's claims as to the constitutionality of the prior version of the code. Furthermore, we are confident that the City does not contemplate returning to its prior zoning ordinance, given our strict disapproval of this type of governmental "flip-flopping." *See Jews for Jesus v. Hillsborough County Aviation Auth.*, 162 F.3d 627, 630 (11th Cir. 1998). In such an instance, the courthouse door would remain open for reinstatement of such a law suit. *Id.* We are convinced that since the City harbors no intentions of returning to the prior zoning ordinance this case does not fall within an exception that would require us to retain jurisdiction.

REVERSED and REMANDED, with instructions to DISMISS for lack of subject matter jurisdiction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NATIONAL ADVERTISING CO.,

Plaintiff,

v.

CASE NO.:
01-3039-CIV-KING

CITY OF MIAMI,

Defendant. /

MEMORANDUM OPINION
GRANTING SUMMARY JUDGMENT

(Filed Sep. 25, 2003)

I. Factual Background

Plaintiff National Advertising Company is a Delaware corporation and a wholly owned subsidiary of Viacom Outdoor Inc., a corporation formerly known as Infinity Outdoor, Inc. National is in the business of erecting and maintaining billboard signs on property it leases. National maintains both commercial and noncommercial messages on billboards that are located throughout the City of Miami.

The City of Miami adopted, thirteen years ago on March 8, 1990, a comprehensive Zoning Ordinance that is the subject matter of Plaintiff's First Amendment challenge to the constitutionality of the Ordinance. Ordinance No. 11,000[1] divided the City of Miami into 24 geographical

[1] Enacted pursuant to the Charter of the City, section 3(4), 14 and 72; and the Municipal Home Rule Powers Act of 1973, section 166.011 et seq., Florida Statutes, as amended.

areas and specified regulations applicable to property located within each area. The Ordinance precisely enumerated the specific public purposes and objectives the City intended and hoped to achieve through the enactment of Ordinance No. 11,000.[2] A grace period of five years was provided to Plaintiff, and any other nonconforming billboard or commercial advertising permit holders, with

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[2] The City's objectives as set forth in the Zoning Ordinance:

(1) To promote the public health, safety, morals, convenience, comfort, amenities, prosperity, and general welfare of the City;

(2) To provide a wholesome, serviceable, and attractive community;

(3) To increase the safety and security of home life;

(4) To preserve and create a more favorable environment in which to rear children;

(5) To stabilize and enhance property and civic values;

(6) To develop meaningful and productive relationships between the private sector and City government;

(7) To provides [sic] for a more uniformly just land use pattern and tax assessment base;

(8) To aid in development and redevelopment of the City;

(9) To increase traffic safety and ease transportation problems;

(10) To provide more adequately for vehicular parking, parks, parkways, recreation, schools, public buildings and facilities, housing, job opportunities, light, air, water, sewerage, sanitation, and other public requirements;

(11) To lessen congestion, disorder, and danger which often inhere in unplanned and unregulated urban development;

(12) To prevent overcrowding of land and undue concentration of population;

(13) To conserve and enhance the natural and man-made resources of the City; and

(14) To provide more reasonable and serviceable means and methods of protecting and safeguarding the economic and social structure upon which the good of all depends.

MIAMI, FLA., ZONING ORDINANCE § 120 (1991).

existing structures already erected within which to remove such billboards.[3]

National alleges that the Zoning Ordinance changed the City's zoning classifications, and these reclassified zones had the effect of making "some or all of the offsite signs in the effected zones[4] nonconforming with the Zoning Ordinance."[5]

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[3] On or about March 28, 1991, pursuant to Ordinance No. 10863, the City amended the Zoning Ordinance to include a provision requiring removal of nonconforming characteristics of use, which provides as follows:

> In any district other than residential, any sign, billboard, or commercial advertising structure which constitutes a nonconforming characteristic of use may be continued, provided no structural alterations are made thereto subject to the following limitations on such continuance: (a) Any such sign except a roof sign shall be completely removed from the premises within five (5) years from the date it became nonconforming.

MIAMI, FLA., ZONING ORDINANCE § 1107.2.2(a) (1991). The Zoning Ordinance defines nonconforming characteristics of use as "including those where the nonconformity was created by ordinance adoption or amendment, as provided at section 1101.1, as well as those where nonconformity was created by public taking or court order, as provided at section 1101.2." *Id.* at § 1107.

[4] For purposes of the instant case, National alleges it has billboard signs, or has attempted to obtain permits for signs, on property located in the following areas: (1) Restricted Commercial ("C-1"), (2) Liberal Commercial ("C-2"), (3) Central Business District ("CBD"), (4) Martin Luther King Boulevard Commercial District ("SD-1"), (5) Design Plaza Commercial-Residential District ("SD-8"), and (6) Latin Quarter Commercial-Residential and Residential District ("SD-14"). (01-3039-CIV Compl. ¶ 17; 02-20556-CIV Compl. ¶ 13.)

Except for one lease attached to the deposition of Vincent Carrozza, this voluminous record is unclear as to the validity or existence of the leases National claims to have with the property owners.

[5] (Compl. 01-3039-CIV ¶ 28.)

With the five-year grace period protecting National's existing billboard structures, things remained relatively quiescent for the next ten years.

In April 2001, the City commenced to enforce the Zoning Ordinance by issuing notices to property owners on whose property National had erected billboard signs. The City notices advised the property owners that they were in violation of "'Article (11) Sections 1107.2.2(a) [sic] Failure to Completely Remove a Sign, Billboard, or a Commercial Advertisement from the Subject Property.'"[6] The property owners were told to correct the violations by various deadlines established throughout the month of May 2001, and that failure to do so could result in $500 per day fines, arrest, and closing their businesses, by the City's Code Enforcement Board.

The Miami City Commission, on July 10, 2001, authorized the City Manager to notice a meeting for July 19, 2001, at which the City Commission could make a finding that companies engaged in outdoor advertising in the City of Miami are notorious outstanding lawbreakers in order to justify its decision to authorize the removal of the billboards without notice, to hold outdoor advertising companies "in contempt of the City Commission, . . ."[7]

The City served over 100 property owners with summonses to appear before its Code Enforcement Board to respond to charges that the owners had failed to completely remove signs, billboards, or commercial advertisements from their property.

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[6] (Compl. 01-3039-CIV ¶ 32.)

[7] (Compl. 01-3039-CIV ¶ 33.)

At the hearings[8], ten of the properties upon which Plaintiff's billboards were located were found to be in violation of the Ordinance and the signs were ordered removed.[9]

Exercising the appellate rights provided by the Zoning Ordinance, all ten property owners appealed the decisions of the City's Hearing Officers to the County Court in and for Dade County and thereafter, to the Eleventh Judicial Circuit Court of Florida.[10] That court, after the posting of

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[8] Hearings were held pursuant to the summonses on November 29, 2001; May 22, 2002; May 23, 2002; May 24, 2002; May 28, 2002; June 3, 2002; June 12, 2002; June 25, 2002; June 27, 2002; July 9, 2002; July 18, 2002; and July 22, 2002.

[9] The hearing officers ordered as follows:

A. On June 6, 2002, Hearing Officer Kathryn Estevez ordered the following signs removed by June 20, 2002, and imposed a fine of $250 a day: (1) Tillman Wood, 1712 S.W. 1 Street; and (2) Vincent and Gloria Arias, 5741 West Flagler Street. (Mem. In Supp. Of Renewed Mot. For Prelim. Inj., 01-3039-CIV DE # 58, at 6.)

B. On July 19, 2002, Hearing Officer Jeffrey L. Allen ordered the following signs removed within sixty (60) days from the date of his order: (1) Jesus Vasquez, 2810 West Flagler Street; (2) Vincent Carrozza, 3528 West Flagler Street; (3) Luis Guerra, 3620 N.W. 7th Street; (4) Bartolome Calafell, 3411 N.W. 7th Street; (5) Lockport Investments, 219 N.W. 27th Street; (6) George's Service Station, 15 S.W. 17th Avenue; and (7) KC Crook, 2662 S.W. 27th Avenue. (*Id.*)

C. On August 5, 2002, Hearing Officer Marlon Hill ordered FEC Railway to remove the sign located on its property at 420 N.E. 79th Street within thirty (30) days of the date of his order, and threatened a $250 a day fine it is [sic] failed to comply. (*Id.*)

[10] The appeals in the Florida Court have been consolidated and identified as *In re Matter of: City of Miami v. Vicente Arias and W. Gloria*, Case No.: 02-282 AP. Similarly, the appeals to the Circuit Court have been consolidated and identified as *Vicente Arias and W. Gloria v. City of Miami*, Case No.: 02-241 AP. (Mem. In Supp. of Renewed Mot. For Prelim. Inj., 01-3039-CIV DE # 58, at 6.) These appeals are still pending in State Court.

an original appeal bond of $450,000 by Plaintiff granted a stay of the final orders requiring removal of the billboards until such time as the appeal in state court is decided by that court.

II. Procedural Posture

A. National I[11]

On July 11, 2001, in response to the City's enforcement proceedings against property owners with whom National had leases to erect and maintain billboards, National filed its three-count Complaint against the City in this Court[12] alleging that the Zoning Ordinance (1) discriminated in violation of the First Amendment and Equal Protection Clause, (2) lacked procedural safeguards in violation of the First Amendment, and (3) the City's decision to begin immediate removal of the signs without further notice or proceedings violated Due Process and the First Amendment.[13]

Three weeks later, National moved for injunctive relief to prevent "the City of Miami (1) from removing any

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[11] This cause is before the Court upon the parties' Second Cross-Motions for Summary Judgment, filed July 7, 2003. (DE ## 112, 116.) On July 24, 2003, Plaintiff National Advertising ("National") and Defendant City of Miami ("the City") each filed their respective Responses. (DE ## 138, 140.) On August 1, 2003, both the City and National filed their respective Replies. (DE ## 146, 147.) Also pending before this Court is National's Renewed Motion for Preliminary Injunction, filed March 3, 2003. (DE # 56.) On April 7, 2003, the City filed its Response. (DE # 85.) On April 10, 2003, National filed its Reply. (DE # 88.)

[12] *National Advertising Co. v. City of Miami*, Case No. 01-3039-CIV-KING (National I).

[13] (Compl., 01-3039-CIV at 18-23.)

signs owned, leased, or operated by National Advertising . . . , (2) from enforcing the City's sign regulations against any persons or business entities during the pendency of this litigation, and (3) from imposing any fines or filing any liens in conjunction with enforcement of the City's sign regulations against owners of any property owned by or leased to National Advertising, its parents, affiliates, or subsidiaries."[14]

On August 23rd, 24th and September 20th, the Court held evidentiary hearings on National's motion. Plaintiff's Motion for Preliminary Injunction was denied pending exhaustion of National's administrative and appellate remedies guaranteed Plaintiff in the Zoning Ordinance.[15]

National appealed and the Eleventh Circuit issued its Mandate on National's appeal on November 26, 2002, vacating and remanding this Court's Order Denying Motion for Preliminary Injunction and stating that "[b]ecause the City summoned the property owners who lease the property to National, rather than National itself, National had no administrative remedies to exhaust."[16]

National filed an Amended Complaint against the City and Miami Dade County ("the County") on January 30, 2003, alleging new claims in addition to the three originally set forth in the Complaint: (1) the City's refusal to stay the accrual of code enforcement fines discriminates against National on the basis of its exercise of its First and Fourteenth Amendment rights to pursue litigation against

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[14] (Aug. 16, 2001, Emergency Mot. for Prelim. Injunct. at 1.)

[15] (Sept. 21, 2001, Order, 01-3039-CIV DE # 31, at 4.)

[16] *National Adv. v. City of Miami*, No. 01-15676 at 2 (11th Cir. Aug. 27, 2002) (unpublished opinion).

the City, (2) the City and the County's discriminatory acts violate the First Amendment and the Equal Protection Clause, and (3) the City and the County's lack of procedural safeguards violate the First Amendment. Plaintiff sought another injunction on March 3rd of this year.

B. National II

On February 21, 2002, National filed the case referred to as National II[17] in response to the City's rejection of the seven permit applications for commercial speech advertising billboards National submitted in December, 2001 and January, 2002. One of the applications, subsequently resubmitted was granted by the City. On March 3, 2003, the parties filed Cross-Motions for Summary Judgment[18] relating to the factual allegations underlying National II. In an attempt to avoid confusion, those Cross-Motions for Summary Judgment are addressed and ruled upon by separate order.

III. Overview of Arguments

In the Cross-Motions for Summary Judgment, both National and the City set forth various arguments as to why each is entitled to judgment as a matter of law. In its Motion, the City argues that this Court should enter summary judgment in its favor on the following grounds: (1) National's claims are not ripe because National has failed to show injury to its First Amendment rights or its

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[17] *National Advertising Co. v. City of Miami*, Case No. 02-20556-CIV-KING (National II).

[18] (02-20556-CIV DE ## 44, 53.)

advertisers' First Amendment rights; (2) National has no standing because National has no injury-in-fact, any injury National may have was not caused by the City, and National's claims are not redressable by this Court; and (3) National's claims are moot because the ordinance it is challenging has been amended and replaced in its entirety. In its Response, National argues that: (1) National's claims are ripe; (2) National has First Amendment injury; (3) this Court can redress National's claims; and (4) National's claims are not moot as a result of the City's amendment to the Ordinance.

On the other hand, in its Motion for Summary Judgment, National argues that it is entitled to summary judgment because: (1) the Ordinance abridges the First Amendment by a) discriminating on the basis of content against noncommercial speech, b) discriminating against different types of noncommercial speech, and c) favoring onsite commercial speech over offsite commercial speech; (2) the Ordinance lacks procedural safeguards required for a speech licensing scheme; and (3) the unconstitutional provisions cannot be severed. In its Response, the City argues that National's Motion should be denied because (1) there are material facts in dispute, (2) the Court lacks subject matter jurisdiction, and (3) the Ordinance does not violate the First Amendment.

IV. Legal Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citations omitted). If the record as a whole

could not lead a rational fact-finder to find for the nonmoving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). On a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citations omitted). There is no requirement that the trial court make any findings of fact. *Id.* at 251.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993). If the movant meets this burden, the burden then shifts to the nonmoving party to establish that a genuine dispute of material fact exits [sic]. *Id.* To meet this burden, the non-moving party must go beyond the pleadings and "come forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Chanel, Inc. v. Italian Activewear of Florida, Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991). If the evidence relied on is such that a reasonable jury could return a verdict in favor of the nonmoving party, then the Court should refuse to grant summary judgment. *Hairston*, 9 F.3d at 919. A mere scintilla of evidence in support of the nonmoving party's position, however, is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252. If the evidence is merely colorable or is not significantly probative, summary judgment is proper. *Id.* at 249-50.

V. Analysis

The spirit of the First Amendment is to "protect speech from the dangers of government censorship and to

stop the government from suppressing the expression of ideas and public debate through the guise of regulation." *Granite State Outdoor Adver. v. Clearwater, Florida*, 213 F. Supp. 2d 1312, 1333 (M.D. Fla. 2002) (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). In its protection of free speech, press and religion, the First Amendment embodies the ideals this country holds dearest to its national consciousness. Since its infancy, these principles have provided the bedrock of our democratic society. Being able to freely express ideas and opinions constitutes the heart of the American character. As such, courts fiercely protect these freedoms from even the slightest of erosion resulting from government intervention and legislation.

However, with every right comes a corresponding responsibility. A recurring issue in jurisprudential history concerns the Supreme Court's struggle to balance individual rights with the rights of society as a whole. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 300-01 (Kermit L. Hall ed., 1992). Therefore, the courts play an essential role in drawing viable constitutional lines between government regulations and an individual's right to exercise his First Amendment freedoms. Nonetheless, plaintiffs must not be allowed to manipulate courts' visceral need to protect the First Amendment. Instead, courts must vigilantly reject arguments intended to pervert that Amendment's primary purpose.

This case presents a facial challenge on First Amendment grounds to a municipal zoning ordinance by a commercial billboard advertising company. The instant action represents yet another case in what seems to be an ever-increasing trend through which outdoor advertising companies facially challenge municipal ordinances seeking

to strike down such ordinances as entirely void.[19] There have been a series of cases by billboard companies across the Eleventh Circuit against municipal zoning ordinances raising the same facial challenges here asserted.[20] Through these actions, advertising companies transform the proverbial First Amendment shield, intended to protect noncommercial speech, into a sword that assures their commercial well-being. The following analysis presents an in-depth examination of the provisions challenged in this case to determine whether the City's Zoning Ordinance "create[s] an unacceptable threat to the 'profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open.'" *Members of the City Council v. Taxpayers for Vincent, et al.*, 466 U.S. 789, 817

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[19] An interesting fact from these cases is that upon the district court's ruling, the adverse party appeals, and subsequently, the parties settle without the Eleventh Circuit issuing an opinion. For example, in *Wilton Manors Street Systems v. Wilton Manors*, No. 00-6186-CIV-UNGARO-BENAGES (S.D. Fla. Dec. 5, 2000), the court entered an order granting Plaintiff's Motion for Summary Judgment. That order was appealed and the appeal was dismissed as per the parties' Joint Motion to Dismiss. Similarly, in *Florida Outdoor Adver., LLC, v. Boynton Beach*, 182 F. Supp. 2d 1201 (S.D. Fla. 2001) (Middlebrooks, J.), the court entered an order granting Plaintiff's Motion for Summary Judgment. That order was appealed and later the appeal was dismissed because the parties settled. Then, in *Florida Outdoor Adver., LLC v. Boca Raton*, No. 01-8504-CIV-MIDDLEBROOKS (S.D. Fla. Jan. 14, 2003), the district court entered summary judgment for the City, but the advertising company did not appeal. Finally, in *Coral Springs Street Systems, Inc. v. City of Sunrise*, No. 01-7951-CIV-ZLOCH (S.D. Fla. Feb. 21, 2003), what seems to be the most recent billboard case, the parties appealed the district court's order granting Plaintiff's Motion for Summary Judgment. This case is, as far as this Court knows, still pending.

[20] Judges of the Southern District of Florida have rendered four decisions involving the same or similar billboard company challenges to city ordinances.

(1984) (quoting *New York Times Co. v. Sullivan*, 84 S. Ct. 710, 720-21 (1964)).

A. National's Standing to Assert First Amendment Challenge

In the instant action, National alleges that Ordinance No. 11,000[21] is facially unconstitutional because it impermissibly infringes on the free speech rights of National and its advertisers as guaranteed by the First and Fourteenth Amendments. Specifically, National argues that the City's threat to remove some of National's billboards pursuant to its facially unconstitutional sign code constitutes First Amendment injury.[22] National further argues that this Court can redress its injury "[o]nly by striking the City's Sign Code in its entirety and enjoining its further enforcement."[23] In its cross-motion, the City argues that National lacks standing because: 1) National has no First Amendment injury because this case is about

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[21] At the outset, this Court notes that at the time relevant to this case, the City of Miami did not have a sign code. (Tr. of Hr'g on Cross Mot.'s for Summ. J. at 34-40, 8/27/03.) What National alternatively calls the City's "Sign Code" or "Sign Ordinance" consists of numerous sections of nine (9) different Articles pulled from the City's Zoning Ordinance that regulate the use of outdoor signs and structures. (Pl.'s Notice of Filing, 01-3039-CIV DE # 94, at 4.) However, these nine (9) Articles are not individually codified as a sign code, but instead, are part and parcel of the City's comprehensive Zoning Ordinance. (*See* Tr. of Hr'g on Cross Mot.'s for Summ. J. at 35, 39-40, 8/27/03.) Thus, the Court will refer to the challenged provisions as the Zoning Ordinance.

[22] (Pl.'s Mem. In Opp'n to Def.'s Mot. for Summ. J., 01-3039-CIV DE # 138, at 11.)

[23] (Pl.'s Mem. In Opp'n to Def.'s. Mot. for Summ. J., 01-3039-CIV DE # 138, at 2, 14; *see also* Pl.'s Mem. in Support of Mot. for Summ. J., 01-3039-CIV DE # 117, at 18.)

National's right to erect billboards wherever it wants, not speech; 2) any alleged injury was caused by National's refusal to relocate its billboards to areas of the City where they are allowed, not by the City; and 3) National's alleged injury is not redressable by the Court because even if the Court struck the provisions of the City's Ordinance as facially unconstitutional, National's billboards would still be illegal under the City's amended Ordinance and would have to be removed.[24]

Article III of the U.S. Constitution limits federal court jurisdiction to the consideration of actual cases and controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). Part of this case or controversy requirement includes the doctrine of standing, which determines whether a plaintiff is the proper party to bring its claim before the court for adjudication. *Id.* at 560; *see also* Erwin Chemerinsky, *Federal Jurisdiction* 56 (3rd ed. 1999). In *Baker v. Carr*, the Supreme Court cautioned that a plaintiff who is challenging the constitutionality of a state or federal law must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 369 U.S. 186, 204 (1962). Thus, in order to have standing, a plaintiff must prove that: 1) it has sustained an injury "of a legally protected interest;" 2) a "causal connection [exists] between the injury and the conduct complained of;" and 3) the injury is capable of being redressed by the court. *Lujan*, 504 U.S. at 560-61 (citations omitted). Moreover,

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[24] (Def.'s Mem. in Supp. of Summ. J., 01-3039-CIV DE # 112, at 13-17.)

the plaintiff's injury must be "concrete and particularized, and actual or imminent, not conjectural or hypothetical." *Id.* at 560.

However, under the overbreadth doctrine, the Supreme Court has created a limited exception to traditional Article III standing requirements to allow a plaintiff to challenge the "facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others" not before the court. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 505 n.11 (1981); *see also Taxpayers for Vincent*, 466 U.S. at 799. This exception is based on the determination that "First Amendment interests are fragile interests, and . . . the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977). Yet there is always a risk that this exception to the otherwise stringent traditional standing requirements will swallow the general rule. *Taxpayers for Vincent*, 466 U.S. at 799. Accordingly, the Supreme Court has cautioned that the overbreadth doctrine is "manifestly [] strong medicine . . . employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Therefore, to allow a plaintiff to attack an otherwise legitimate statute on facial overbreadth grounds, particularly where the statute's purpose is to regulate conduct and not speech, the overbreadth must be "not only real but *substantial* as well," such that there is "a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Taxpayers for Vincent*, 466 U.S. at 799-01 (emphasis added). The overbreadth doctrine did not, however, "create any exception from the general rule that

constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *Id.* at 798. Thus, the Supreme Court has permitted a commercial billboard company to assert a facial overbreadth challenge to an ordinance only where the company also engaged in a "*substantial amount* of noncommercial advertising." *Metromedia*, 453 U.S. at 504 (emphasis added).

National Advertising, in this case has, by its own estimate a *de minimis* noncommercial interest. It is an outdoor billboard company publishing commercial advertising on 98% of its structures.[25]

1. National has standing to challenge the provisions of the Ordinance relating to commercial speech

Because National's interests in this case are overwhelmingly commercial[26], National's standing to challenge provisions of the Ordinance that affect commercial as opposed to noncommercial speech will be examined separately. With regard to commercial speech, National has demonstrated particularized, imminent injury, traceable to the City's conduct, which can be redressed by the Court.

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[25] In National Advertising II, the seven permit applications filed by Plaintiff were for commercial billboards. No mention was made (in the permit application) for Plaintiff's intent to publish noncommercial speech.

[26] According to Joseph H. Little, Director of Real Estate in the Southeast for Viacom Outdoor, Inc., noncommercial messages displayed on National's billboards represent approximately 2% of National's total advertising. (Aug. 28, 2002, Tr. of Prelim. Inj. Hr'g at 23:3-13.) Thus, the remaining 98% of National's advertising consists of commercial messages displayed on billboards located throughout the City of Miami.

National is a commercial, for-profit billboard advertising company, and a wholly owned subsidiary of the largest advertising company in the United States, Canada, and Mexico.[27] National currently has billboards standing in the City of Miami that, but for the City's Zoning Ordinance, are presumably there legally.[28] The City has threatened removal of National's billboards under the Ordinance and has begun enforcement proceedings against property owners to have some of National's billboards removed. Moreover, this Court has the power to strike and enjoin enforcement of any provisions of the Ordinance found to be unconstitutional. Therefore, this Court finds that National has Article III standing to challenge those provisions of the City's Zoning Ordinance that restrict commercial speech.

2. National does not have standing to challenge the provisions of the Ordinance that do not relate to noncommercial speech

National's standing, under the overbreadth exception to challenge those provisions of the Zoning Ordinance that allegedly unconstitutionally restrict noncommercial speech

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[27] (01-3039-CIV Am. Compl. ¶ 4.)

[28] The record is unclear as to the validity or existence of the leases National claims to have with property owners at issue in this case. The parties have had a full opportunity to develop, in the discovery and pleading practice phase of this case the validity, or indeed even the existence of, leases National claims to have with property owners it purports to represent in this case. The Plaintiff, at a minimum, must show that it either owns or leases some or all of the approximate 100 billboard sign locations for which the City has issued summonses to the owners of the property as being in violation of the City's Zoning Ordinance No. 11,000.

is a more difficult question.[29] After careful consideration, this Court concludes that National does not have the required substantial interest in noncommercial speech to have any standing to assert challenges on behalf of noncommercial advertisers (if any there be) to the noncommercial provisions of the Zoning Ordinance.

First, the purpose of the City's Zoning Ordinance, like most municipal zoning ordinances, is to regulate land use within the City of Miami to avoid "unplanned and unregulated urban development."[30] More specifically, the approximately 800-page Zoning Ordinance divides the city into different districts and regulates everything from the height of buildings, to the construction and location of billboards, signs, and other structures, the construction and location of parking lots, the use of water, and the occupancy rates of dwelling units.[31] Since the purpose of the City's Ordinance is to regulate conduct, not speech, it is unlikely that the overbreadth challenge has any relevancy at all to this case.

Second, National has failed to demonstrate the kind of "substantial overbreadth" contemplated by the Supreme Court that would justify application of the exception in this case. In *Taxpayers for Vincent*, the Supreme Court reiterated that "'the overbreadth of a statute must not

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[29] Judge Moody succinctly stated that "[t]he overbreadth doctrine is referred to frequently, yet it remains little understood and a source of much confusion." *Granite State Outdoor Adver.*, 213 F. Supp. 2d at 1321 n.11 (citing Hill, Alfred, "The Puzzling First Amendment Overbreadth Doctrine," 25 Hofstra L. Rev. 1063 (Summer 1997); Fallon, Jr., Richard H., "Making Sense of Overbreadth," 100 Yale L.J. 853 (Jan. 1991)).

[30] MIAMI, FLA., ZONING ORDINANCE § 120 (1991).

[31] *See, e.g., Id.* at §§ 200, 210, and 220.

only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" 466 U.S. at 800 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). In *Bates*, the Supreme Court further stated that "justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. . . . Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." 433 U.S. at 380-81. Finally, in *Broadrick*, eight justices agreed that an overbreadth challenge should not be entertained in every First Amendment case,[32] and the Court concluded that the overbreadth exception, "a limited one at the outset," becomes less justified as the behavior sought to be regulated "moves from 'pure speech' toward conduct." 413 U.S. at 615.

Here, National has been engaged in billboard advertising in the City of Miami for approximately forty years,[33] yet Plaintiff has not presented this Court with a single instance where the City has ever infringed on anyone's noncommercial free speech rights.[34] Thus, National has

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[32] *Metromedia*, 453 U.S. at 547 (Stevens, J., dissenting). This Court notes that Justice Stevens wrote the majority opinion in *Taxpayers for Vincent* only four (4) years after dissenting in *Metromedia* and discusses standing and the overbreadth doctrine extensively in both opinions. Therefore, this Court gives his dissenting opinion in *Metromedia* great weight.

[33] (01-3039-CIV Am. Compl. ¶ 9.)

[34] Despite the voluminous record in this case, National has not produced any testimony nor a single affidavit of anyone attesting to a situation in which he or she petitioned to put up a noncommercial message and the City deprived them of that right. On the contrary, the Court finds that the record is replete with evidence that National's *sole*

(Continued on following page)

sustained no injury with regard to its noncommercial speech rights, nor has it demonstrated any "realistic danger" that the Ordinance's very existence threatens the First Amendment rights of others not before the Court. In fact, the Ordinance National is challenging has been amended and is no longer in effect.[35] While this Court recognizes that a city cannot escape overbreadth review simply by amending its Ordinance,[36] the Court finds it illogical to extend the limited overbreadth doctrine to an Ordinance that cannot chill any speech in the future, and, by all accounts, has not chilled any in the past. There is simply no reason to think that National's interests in any way parallel those of noncommercial speakers,[37] and this Court hesitates to facially invalidate a zoning ordinance, enacted by the elected officials of the City of Miami to regulate the use of land in that city, based on mere prediction and speculation.[38] "[U]nder our constitutional system courts are not roving commissions

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interest is in erecting commercial billboards wherever it chooses throughout the City in order to ensure its commercial well-being.

[35] National has not challenged the City's amended Ordinance in this litigation.

[36] *See Massachusetts v. Oakes*, 491 U.S. 576, 586-87 (1989).

[37] *Compare Metromedia*, 453 U.S. at 548 (Stevens, J., dissenting) (stating that the interests of onsite advertisers do not necessarily parallel the interests of commercial offsite billboard advertisers).

[38] *See id.* at 547 (Stevens, J., dissenting) (stating that while overbroad legislation "may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe").

assigned to pass judgment on the validity of the Nation's laws,"[39] and this Court will not presume to do so here.

Finally, this Court does not read *Metromedia* to stand for the proposition that a plaintiff with a *de minimis* interest in noncommercial speech may facially challenge an ordinance raising the noncommercial speech interests of third parties who have not shown any injury and who are not before the Court. Interestingly, however, four out of five of National's First Amendment challenges to the City's Zoning Ordinance are on behalf of noncommercial speech interests. Specifically, National's Complaint alleges that the Ordinance discriminates:

> a. Against *noncommercial speech* on the basis of content by allowing on-site commercial outdoor advertising signs while prohibiting noncommercial outdoor advertising signs at the same sites.
>
> b. Against *noncommercial speech* on the basis of content by prohibiting noncommercial signs generally, but allowing some noncommercial signs.
>
> c. Against *noncommercial speech* on the basis of content by exempting some noncommercial signs from licensing altogether.
>
> d. Against *noncommercial speech* on the basis of content by imposing more restrictive size, height, and spacing requirements on some noncommercial signs than on others on the basis of content.

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[39] *Id.* at 546 (Stevens, J., dissenting) (discussing standing and the overbreadth doctrine).

e. Against *commercial offsite signs* by banning most such signs.

f. Against all signs on the basis of the zone in which they are located.[40]

In the instant case, National's Vice President, Joseph H. Little, testified that National's billboard displays are "largely commercial," and noncommercial advertising constitutes only "[p]erhaps two percent" of National's total advertising budget.[41] Even if two percent of National's billboards in the City of Miami contain noncommercial messages, this Court concludes that two percent does not constitute a "substantial amount," as mandated as an absolute prerequisite to invoking the overbreadth exception.[42] National's counsel relies heavily upon the little

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[40] (01-3039-CIV ¶ 67(a)-(f).)

[41] (Tr. Of Prelim. Inj. Hr'g. at 23; 7, 10, 8/28/2002.)

[42] At oral argument, the following exchange occurred between the Court and National's attorney:

> Mr. Julin: Our client has standing, like *Metromedia*, because we – *Metromedia* had two percent of its signs used for noncommercial speech.
>
> Court: Is that in the opinion –
>
> Mr. Julin: Yes, it is. It is in the opinion.
>
> Court: – in the *Metromedia* opinion? It's not in the Supreme Court of California opinion or anywhere else? That's somewhere in the opinion, two percent?
>
> Mr. Julin: Yes.
>
> Court: I don't have any difficulty that it's – that you have read it somewhere in the record.
>
> Mr. Julin: No, it's not in the record. It's actually referred to in the opinion . . .
>
> Court: I accept your word it's in there. Now, the Court there, you say, held that was a substantial, a substantial element of discrimination against noncommercial speech?

(Continued on following page)

understood footnote from the plurality opinion in *Metromedia* holding: "we have never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interest of others." 453 U.S. at 505 n.11. The doctrine of standing in First Amendment billboard cases is unclear at best. *See Lamar Adver. Co. v. City of Douglasville*, 254 F. Supp. 2d 1321, 1327 n.3 (N.D. Ga. 2003) (citing numerous cases that note the uncertain state of the law in this area). Counsel's reading of this quoted footnote from *Metromedia* is a basis for his interpretation that even a *de minimis* two percent noncommercial speech publication by a commercial billboard advertising company gives National herein an almost absolute right to raise all the noncommercial First Amendment challenges to a city ordinance that would be

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Mr. Julin: Yes.

Court: Is two percent, in your view, substantial?

Mr. Julin: It is substantial. Here is what they are saying. They are saying the city has made a determination that some content of noncommercial speech is going to be allowed, not only in certain areas, but in all the zones of the city there are these general exceptions for certain types of noncommercial speech.

* * *

Court: I just have difficulty with the concept, if the Supreme Court said that in that case, and I assume they did, that it's substantial. Two percent seems to me to be not substantial. 98 percent seems substantial. Two percent does not.

(Tr. of Hr'g. on Cross Mot.'s for Summ. J. at 96: 4, 97:10-14, 8/27/03.)

This Court diligently searched the *Metromedia* opinion and found no reference to two percent.

otherwise available to noncommercial speakers. This is the authority, counsel urges, giving National the right to the overbreadth exception and the consequent noncommercial challenges National has raised.

It defies logic and all reasonable interpretation of the language of *Metromedia* referred to above (relied upon by National) where the Supreme Court has simply said that it has not yet determined that an entity with a commercial interest can *never* raise a First Amendment challenge to the facial validity of a statute, into a legal principal that even a slight (*de minimis*) interest in noncommercial speech by a overwhelmingly proportionate commercial speech billboard company thus giving it the right to take up the sword on behalf of noncommercial advertisers (if any) in the battles they fight to protect their commercial interests. Therefore, this Court finds that National cannot raise a facial overbreadth challenge to the City's Zoning Ordinance.

B. Content-Based v. Content-Neutral

At the heart of this case lies the debate over whether the Zoning Ordinance at issue constitutes an impermissible content-based regulation, or a constitutionally sound content-neutral zoning regulation. National argues that the Zoning Ordinance is a facially unconstitutional content-based ordinance that cannot survive strict scrutiny as a result of provisions that favor (1) commercial over

noncommercial speech;[43] (2) some noncommercial over other noncommercial speech;[44] and (3) onsite commercial

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[43] In support of this argument, National cites to the following Ordinance provisions:

Code Section	Zone	Code Page	Nature
401	G/I	119	Onsite only.
401	C-1	129	Onsite only.
401	CBD	132.1	Onsite only.
401	I	130.9 & 132.4	Onsite only.
401	RT	137	Point of sale; outdoor advertising.
601.4.1.2	All	178	Plant nurseries; outdoor dining; etc.
615.8	SD-15	270	Onsite only; not more than one-half Of sign shall advertise subsidiary products or services.
616.11	SD-16	280	Same as 602.11; onsite; offsite prohibited.
926.10.3	All	375	Onsite signs not in use.
926.15	All	376	Outdoor advertising.

(Pl.'s Notice of Filing, 01-3039-CIV DE # 94, at 5.)

[44] In support of this argument, National cites to the following sections and argues as follows: (1) §§ 925.3.12 and 925.3.13 permit "political campaign signs connected to elections but prohibit[ ] political signs unrelated to elections;" (2) § 925.3.11 permits "civic campaign signs in the C-1 zone but not other noncommercial signs;" (3) § 925.3.19 allows "freestanding perimeter wall signs for identifying developments but not for political messages;" and (4) § 925.3 exempts "certain noncommercial signs (e.g. flags, real estate signs, election signs, from the permitting process while imposing permit requirements on others." (Pl.'s Mem. In Supp. of Mot. for Summ. J., 01-3039-CIV DE # 117, at 8-9.)

National also identifies the following sections in further support of this argument: (1) § 401 at 98, 100, 102, 107, 111, 115, 119, 128, 103.3, 132.1, 180.9, and 137; (2) § 507 at 160; (3) § 602.11 at 186; (4) § 604.11 at 190; (5) § 605.11 at 202; (6) § 606.11 at [illegible]; (7) § 606.11 at 214; (8) § 607.11 at 226; (9) § 607.11 at 226; (10) § 608.11 at 229; (11) § 609.11 at 230.2 (this Court could not identify this section in the copy of the Zoning Ordinance filed in this record); (12) § 611.11 at 235; (13) § 613.11 at 240; (14) § 614.3.8 at 246; (15) § 615.8 at 270; (16) § 616.11 at 280; (17) § 620.8 at 288.1; (18) § 622.11 at 294; (19) § 623.8; (20) § 625.8; (21)

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over offsite commercial speech.[45] On the other hand, the City asserts that the Ordinance is simply a content-neutral

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every subsection of § 925.3 at 368-372 (exempting the following signs from permit requirements: a) signs erected by or on order of governmental jurisdictions, b) national flags and flags of political subdivisions, c) decorative flags and other decorations for special occasions, d) symbolic flags and award flags, e) address and directional signs or warning signs, f) signs on vehicles, g) real estate signs, h) construction and development signs, I) balloons, j) signs posted on community or neighborhood bulletin signs and kiosks, k) temporary civic campaign signs, l) temporary political campaign signs, m) cornerstones and memorials, n) U.S. mailboxes, o) signs on bus shelters/benches or trash receptacles, p) weather flags, q) signs identifying churches, and r) freestanding perimeter wall signs identifying developments); (22) § 926.5.1 at 373; (23) § 926.9 at 374 (exempting signs of historic significance from permit requirements); (24) 926.10.3 at 375; (25) 926.12 at 376; (26) 926.15 at 376; (27) 926.16 at 378; (28) definitions of various words set forth in § 2502 at 683-720. (Pl.'s Notice of Filing Zoning Ordinance, Sign Code and Challenged Provisions, 01-3039-CIV DE # 94, at 5-7.)

[46] In support of this argument, National cites to the following Ordinance provisions:

Code Section	Code Page	Nature
401	119	Onsite only.
401	129	Onsite only.
401	132.1	Onsite only.
401	130.9 & 132.4	Onsite only.
401	137	Point of sale; outdoor advertising.
601.4.1.2	178	Plant nurseries; outdoor dining; arts & crafts; Demonstrations; performances; flowers; plants & shrubs; objects of art; handicrafts; mass-produced items; produce & foods.
615.8	270	Onsite only; not more than one half of sign shall advertise subsidiary products or services.
616.11	280	Same as 602.11; onsite height; offsite prohibited.
926.10.3	375	Onsite signs not in use.
926.15	376	Outdoor advertising.

(Pl.'s Notice of Filing Zoning Ordinance, Sign Code and Challenged Provisions, 01-3039-CIV DE # 94, at 8-9.)

zoning regulation intended to prevent the construction of billboards in certain areas throughout the City; namely, restricted commercial and residential zoning districts.[46]

With regard to whether an ordinance is content-based or content-neutral, the Supreme Court has stated as follows:

> The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1987) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (internal citations omitted)). Furthermore, the Eleventh Circuit has noted that in evaluating facial challenges to an ordinance, courts must attempt to construe any ambiguities "in a manner which avoids constitutional problems." *Southlake Prop. Assoc., Ltd. v. Morrow, Georgia*, 112 F.3d 114, 119 (11th Cir. 1997) (citing *American Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir. 1990)). In the following analysis, the Court evaluates each of National's arguments and finds that the City's Zoning Ordinance constitutes a constitutionally

[46] (Aug. 28, 2002, Tr. of Prelim. Inj. Hr'g at 40:23-41:7.)

permissible content-neutral regulation intended to regulate structures rather than to suppress speech.

1. Commercial Speech-Constitutionality

In addition, National argues that this Court should strike down the Zoning Ordinance as an unconstitutional content-based regulation because of its different treatment of offsite and onsite commercial speech.[47] As the basis for this argument, National cites to provisions in the Ordinance that allow onsite commercial signs but prohibit offsite commercial signs.[48] *See supra* note 45. Specifically, National argues that because of the way the Ordinance defines "onsite" and "offsite" signs, this distinction results in greater protection being offered to onsite commercial signs, e.g., a drugstore advertising "Bayer Aspirin," as opposed to offsite commercial signs, e.g., a billboard above a drugstore advertising "Goodyear Tires."

A casual review of First Amendment precedent reveals the judicial consensus that commercial speech is not accorded the same level of protection as noncommercial speech. In *Ohralik v. Ohio State Bar Assn.*, the Supreme Court stated:

> To require a parity of constitutional protection for commercial and noncommercial speech alike

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[47] (Pl.'s Mem. In Supp. of Summ. J., 01-3039-CIV DE # 117, at 9.)

[48] This Court would like to clarify that in light of *Southlake* and this Court's previous analysis, offsite signs by their very nature are commercial signs. *See* discussion *infra* Part V.B.2.a. However, in this section the Court will refer to offsite "commercial" signs for congruency with National's arguments and to avoid confusion.

> could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

436 U.S. 447, 456 (1978). Subsequently, the Court set forth the following four-part test for analyzing the validity of a governmental regulation of commercial speech: (1) the only commercial speech subject to protection is that which concerns lawful activity and is not misleading; (2) a valid regulation must assert a substantial governmental interest; (3) the regulation must directly advance the governmental interest asserted; and (4) the regulation is no more extensive than necessary to achieve that interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

A year later in *Metromedia*, the Supreme Court specifically addressed one of the questions National brings before this Court; namely, whether a city can constitutionally regulate commercial speech through an onsite-offsite distinction. 453 U.S. 490. The ordinance in *Metromedia* permitted onsite commercial advertising,[9] "but other

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[9] Onsite commercial advertising signs were defined as those "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising foods manufactured or produced or services rendered on the

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commercial advertising and noncommercial communications using fixed-structure signs [were] everywhere forbidden unless permitted by one of the specified exceptions."[50] *Id.* at 496. The city's purpose in passing such an ordinance was to further "traffic safety and the appearance of the city." *Id.* at 507. The plaintiff, a billboard company, challenged the ordinance on the grounds that it would eliminate the outdoor advertising business in San Diego and that this violated the First and Fourteenth Amendments. *Id.* at 503-04.

In addressing plaintiff's claims, the Court applied the four-prong *Central Hudson* test and stated that "[t]here can be little controversy over the application of the first, second, and fourth criteria." *Id.* at 507. First, the Court indicated that there was no evidence that the commercial speech at issue was either misleading or involved unlawful activity. *Id.* Next, the Court stated that there could not be "substantial doubt that the twin goals that the ordinance seeks to further – traffic safety[51] and the appearance of the

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premises upon which such signs are placed." *Metromedia*, 453 U.S. at 494.

[50] The ordinance set forth the following categories of signs as exceptions to the general prohibition: (a) government signs; (b) signs located at public bus stops; (c) signs manufactured, transported, or stored within the city, if not used for advertising purposes; (d) commemorative historical plaques; (e) religious symbols; (f) signs within shopping malls; (g) for sale and for lease signs; (h) signs on public transportation vehicles; (I) signs on commercial vehicles; (j) signs depicting time, temperature, and news; (k) approved temporary, off-premises, subdivision directional signs; (l) and "temporary political campaign signs." *Id.* at 494-95.

[51] In support of this conclusion, the Court cited to *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949). In *Railway Express*, New York City passed a regulation banning advertising on vehicles. 336 U.S. at 107-108. The plaintiff, a national company that sold advertising

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city[82] – are substantial governmental goals." *Id.* at 507-08. As to the fourth prong, the Court explicitly rejected the plaintiff's argument that the ordinance was overly broad, stating:

> If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its end: It has not prohibited all billboards,

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space on the side of its trucks, argued that the regulation violated the equal protection clause of the Fourteenth Amendment. *Id.* at 109-10. In upholding the regulation on that ground, the Court upheld a local municipality's right to determine what constituted a traffic hazard. *Id.* at 109. Specifically, the Court stated that it was not the Court's "function to pass judgment on [the city's] wisdom. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false." *Id.* (internal citations omitted). Moreover, the Court stated that even though the regulation did not ban all distractions, this omission did not invalidate it because "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Id.* at 466 (citing *Central Lumber Co. v. South Dakota*, 226 U.S. 157, 160 (1912)).

[82] In support of this conclusion, the Court referenced the following precedent: (1) *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (reaffirming prior holdings that local governments may enact legislation intended to maintain the character and aesthetics of a municipality.); (2) *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding an ordinance that restricted land use to one-family dwellings on the grounds that a city's police powers encompass maintaining esthetics and societal values.); (3) *Berman v. Parker*, 348 U.S. 26, 33 (1954) (holding that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.")

> but allows onsite advertising and some other specifically exempted signs.

Id. at 508.

Finally, the Court turned its analysis to the third prong, what is considered the "more serious question," and reasoned as follows:

> In the first place, whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the state [sic] objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising. Second, the city may believe that offsite advertising, with [its] periodically changing content, presents a more acute problem than does onsite advertising. Third, San Diego has obviously chosen to value one kind of commercial speech – onsite advertising – more than another kind of commercial speech – offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interest in traffic safety and esthetics. The city has decided that in a limited instance – onsite commercial advertising – its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise – as well as the interested public – has a stronger interest in identifying its place of business and advertising the product or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. *It does not follow from the fact that the city has concluded that some commercial interests outweigh*

> *its municipal interests in this context that it must give similar weight to all other commercial advertising.*

Id. at 511-12 (emphasis added). Therefore, the Court held that "[i]n light of the above analysis, we cannot conclude that the city has drawn an ordinance broader than is necessary to meet its interest, or that it fails directly to advance substantial government interests. In sum, insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of *Central Hudson*. . . ." *Id.* at 511-12.

Here, National seeks to divert this Court's attention from binding Supreme Court precedent laid out in *Metromedia* by arguing that the City's Zoning Ordinance fails to pass muster under the *Central Hudson* test in light of two recent Supreme Court opinions: *Edenfield v. Fane*, 507 U.S. 761 (1993) and *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999).[53] First, National argues that pursuant to *Edenfield*,[54] the city's asserted

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[53] (Pl.'s Mem. in Supp. of Mot. for Summ. J., 01-3039-CIV DE # 117, at 11.)

[54] In *Edenfield*, the state passed legislation that banned in-person solicitation by certified public accountants ("CPAs"). 507 U.S. at 763. In support of this ban, the state set forth two interests: (1) "protecting consumers from fraud or overreaching by CPA's," and (2) "maintain[ing] both the fact and appearance of CPA independence in auditing a business and attesting to its financial statements." *Id.* at 768. The Court held that although these interests might be substantial interests, a complete ban on such solicitation did not meet the third prong of *Central Hudson*; namely, directly advancing those governmental interests. *Id.* at 770. Specifically, the Court stated that the state had "not demonstrated that, as applied in the business context, the ban on CPA solicitation advances its asserted interests in any direct and material way." *Id.* 771.

interests in traffic safety and esthetics are not directly advanced by the Ordinance and therefore, do not meet the third prong of *Central Hudson* because the City "cannot justify [its] ban on offsite signs."[55] Next, National argues that pursuant to *Greater New Orleans*,[56] the City has not carefully calculated the costs and benefits associated with implementation of the Ordinance and, as such, the Ordinance does not satisfy the fourth prong of the *Central Hudson* test. (*Id.*)

However, after carefully analyzing *Edenfield* and *Greater New Orleans* in light of the facts of the instant case, this Court finds that National's reliance on those opinions is misplaced. The Supreme Court struck down the legislation in those cases because either (1) the interests set forth were not directly advanced by the statute in

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[55] (*Id.* (citing *Edenfield*, 507 U.S. at 771.))

[56] In *Greater New Orleans*, the plaintiff challenged 18 U.S.C. § 1304 on First Amendment grounds. 527 U.S. at 181. Section 1304 effectively banned advertisements of private casino gambling broadcast by radio or television stations regardless of where the stations and/or casinos were located. *Id.* at 178-182. In defending the constitutionality of Section 1304, the government identified the following interests advanced by that section: (1) "reducing the social costs associated with 'gambling' or 'casino gambling,'" and (2) "assisting States that 'restrict gambling' or 'prohibit casino gambling' within their own borders." *Id.* at 185. In recognizing that these interests constitute substantial government interests, the Court noted that they are not self-evident as a result of "Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General." *Id.* at 187. As a result, after applying the *Central Hudson* analysis, the Court struck down the statute as unconstitutional, and held that the government failed to show how the statute directly advanced its stated interests. *Id.* at 188-96 In so holding, the Court noted that "[t]he operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the government cannot hope to exonerate it." *Id.* at 190.

question,[57] or (2) the statute was overly broad.[58] However, both cases are factually distinguishable from the instant case in that the government's asserted interests in those cases are unrelated to the interests the City of Miami asserts as justification for the Zoning Ordinance. *See supra* note 54; *See infra* note 56. Therefore, this Court finds that its application of the *Central Hudson* test must be guided by *Metromedia,* rather than *Edenfield* and *Greater New Orleans,* because the facts in *Metromedia* are parallel to the facts in this case.

Here, like in *Metromedia,* the City is enforcing an Ordinance that effectively bans offsite commercial speech while allowing onsite commercial speech in order to promote traffic safety and esthetics. National is arguing, like the plaintiff in *Metromedia,* that this disparity results in some commercial speech – onsite commercial – being favored over other commercial speech – offsite commercial. However, *Metromedia* explicitly held that this disparity is allowed. Yet, National reasserts the arguments set forth by the plaintiff and rejected by the Court in *Metromedia* that the Ordinance must be struck down as unconstitutional because it fails to pass muster under the third and fourth prongs of *Central Hudson.*

As to the third prong, National argues that the Ordinance does not directly advances [sic] its stated interests because the City has not provided evidence showing that billboards are connected to traffic safety and esthetics, or that offsite signs are harmful at all. However, National

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[57] *See supra* note 54.

[58] *See supra* note 56.

fails to recognize that the reasoning in *Metromedia* explicitly rejects this argument. Here, among the 14 specified purposes of the Ordinance,[59] the City asserts a desire to ensure traffic safety and "provide a wholesome, serviceable, and attractive community." MIAMI, FLA., ZONING ORDINANCE § 120 (1991). Contrary to National's argument, this Court does not find that the City must conduct expensive research to conclude that offsite commercials [sic] signs pose a threat to traffic safety and esthetics. On the contrary, this Court hesitates, as the Supreme Court in *Metromedia* hesitated, to question or challenge the reasonable conclusion of the City's local legislators that offsite signs pose a threat to traffic safety. *See Metromedia*, 453 U.S. at 509. Moreover, similar to the *Metromedia* Court, this Court finds that it is not unreasonable for those lawmakers to conclude that offsite signs in themselves constitute an esthetic harm wherever they are located or placed.[60] *See id.* at 510. Therefore, this Court concludes that the Zoning Ordinance at issue directly advances the City's interests in maintaining traffic safety and esthetics by prohibiting offsite signs.

Finally, as to the fourth prong, this Court disagrees with National's argument that the Ordinance must indicate that the City carefully calculated the costs and benefits associated with prohibiting offsite signs. *See* discussion *supra*. The fourth prong of *Central Hudson*

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[59] *See supra* note 2.

[60] In fact, the Eleventh Circuit in *Harnish v. Manatee County*, explicitly noted that *Metromedia* and its progeny conclusively established that "[a]esthetics is a substantial governmental goal which is entitled to and should be accorded weighty respect." 783 F.2d 1535, 1539 (11th Cir. 1986).

requires that the ordinance be no more extensive than necessary to achieve its interests. 447 U.S. at 566. Here, the City of Miami has concluded that offsite signs pose a threat, and it has directly banned those signs. Following the Supreme Court's reasoning in *Metromedia,* this Court finds that the City's failure to also ban onsite commercial signs does not cause the Ordinance to be overly broad. On the contrary, the City of Miami, just like the city in *Metromedia,* has "gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs." *Metromedia,* 453 U.S. at 508. Thus, this Court concludes that the Ordinance is no more extensive than necessary to achieve the City's stated purposes.

Accordingly, this Court finds that the Zoning Ordinance, as it relates to onsite-offsite commercial signs, is constitutional pursuant to the *Central Hudson* test because: (1) there is no evidence indicating that the commercial speech at issue concerns unlawful activity or is misleading; (2) the Ordinance asserts the substantial governmental interests of maintaining traffic safety and esthetics; (3) the Ordinance directly advances these governmental interests by banning offsite signs; and (4) the Ordinance is no more extensive than necessary to achieve the states interests even though it allows onsite signs.

2. The Zoning Ordinance does not unconstitutionally discriminate against noncommercial speech

This Court has clearly and unequivocally held that National does not have standing to assert a facial challenge to the provisions of the Ordinance that affect noncommercial speech, because it lacks a "substantial interest" in such speech. *See* discussion *supra* Part V.A.2. However, because of the lack of clarity in First Amendment case law, this Court has carefully analyzed the provisions of the Zoning Ordinance that affect noncommercial speech. After careful consideration, the Court concludes that those provisions of the Ordinance affecting noncommercial speech do not constitute an unconstitutional content-based restriction, rather the Ordinance is a content-neutral regulation that governs structures rather than restricts speech.

a. Noncommercial Speech v. Commercial Speech

National claims that the City's Zoning Ordinance is an unconstitutional content-based regulation that favors commercial speech over noncommercial speech. In support of this argument, National cites to provisions in the Ordinance that allow onsite signs and prohibit offsite signs. *See supra* note 43. One of the provisions National is challenging regulates signs in the C-1 Restricted Commercial zoning district, and contains similar language as some of the other challenged provisions:

> Onsite signs only shall be permitted in these districts, subject to the following requirements and limitations. Except as otherwise provided, such signs may be illuminated but shall not be

> animated or flashing. At retail or service establishments, in addition to identifying the principal business, commodity or service, such signs may devote not more than half of their actual aggregate to the advertising of subsidiary products sold or services rendered on the premises.

MIAMI, FLA. ZONING ORDINANCE § 401 at 128. The Ordinance defines onsite signs as "[a] sign relating in its subject matter to the premises on which it is located, *or* to products, accommodations, services, or activities on the premises. Onsite signs shall not be construed to include signs erected by the outdoor advertising industry in the conduct of the outdoor advertising business." *Id.* § 2502 at 713 (emphasis added). Relatedly, the Ordinance defines offsite signs as "[a] sign other than an onsite sign. The term includes, *but is not limited to,* signs erected by the outdoor advertising industry in the conduct of the outdoor advertising business." *Id.* § 2502 at 712 (emphasis added).

The Eleventh Circuit has specifically considered whether an ordinance that prohibits offsite signs and allows onsite signs unconstitutionally discriminates against noncommercial speech. *Southlake,* 112 F.3d 1114. In *Southlake,* the plaintiff sought to erect four offsite outdoor advertising billboards in the City of Morrow. *Id.* at 1115. Morrow's sign ordinance prohibited billboards, defined as any "sign which advertises a commodity, product, service, activity or any other person, place, or thing, which is not located, found or sold on the premises upon which the sign is located." *Id.* at 1115, 1117. The plaintiff claimed that the ordinance was facially unconstitutional because (1) it impermissibly regulated commercial speech, and (2) it unconstitutionally burdened noncommercial speech through its onsite-offsite distinction. *Id.* at 1115.

In analyzing the plaintiff's claim, the Eleventh Circuit asserted that the onsite-offsite distinction in the commercial speech context is straightforward, readily ascertainable, and constitutional. *Id.* (citing *Metromedia*, 453 U.S. at 512). On the other hand, the court noted that "[l]ocating the site of noncommercial speech . . . is fraught with ambiguity" because "[n]oncommercial speech usually expresses an idea, an aim, an aspiration, a purpose, or a viewpoint. Where is such an idea located? What is the site upon which the aspiration is found?" *Id.* at 1119. In wrestling with this ambiguity, the court considered and unambiguously rejected the First Circuit's reasoning in *Ackerley* that "'[t]he only signs containing noncommercial messages that are [onsite] are those relating to the premises on which they stand, which inevitably will mean signs identifying nonprofit institutions.'" *Id.* (quoting *Ackerley Communications of Mass., Inc. v. City of Cambridge*, 88 F.3d 33, 37 (1st Cir. 1996)). The Eleventh Circuit noted that the *Ackerley* view unduly restricts onsite noncommercial speech to places where "some organized activity associated with the idea espoused is located or found."[61] *Id.* In fact, the court reasoned that application of the view espoused in *Ackerley* would mean that any ordinance prohibiting offsite signs would ban, with few exceptions, all noncommercial messages, and must then be declared void. *Id.* The court warned that this result is contrary to the well-established notion that when evaluating facial challenges to an ordinance, any ambiguities must be construed "in a

[61] The Eleventh Circuit noted that under this view "speech advocating racial bigotry is onsite at a Klavern of the Klan; 'Save the Whales' is onsite where Greenpeace has an office; and 'Jesus Saves' is displayed onsite only where a Christian religious organization is operating." *Southlake*, 112 F.3d at 1119

manner which avoids any constitutional problems." *Id.* (citing *American Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir. 1990) and *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981)).

In evaluating the *Ackerley* view, the Eleventh Circuit concluded that "[t]here is . . . no logical reason to interpret the ordinance as locating the expression of ideas, aspirations, and beliefs in this way." *Id.* at 1117. Instead, the Eleventh Circuit espoused its own alternative view and stated that "[a]n idea, unlike a product, may be viewed as located wherever the idea is expressed, i.e., wherever the speaker is located. Under this alternative view, *all noncommercial speech is onsite. A sign bearing a noncommercial message is onsite wherever the speaker places it.*" *Id.* at 1117-18 (emphasis added). The Eleventh Circuit then applied this alternative view to the Morrow ordinance and stated as follows:

> Although Morrow's definition of billboard does not explicitly exclude noncommercial speech it defines billboards as a sign containing an offsite message. Under the [Eleventh Circuit's] alternative view of the onsite-offsite distinction, a 'billboard' would not include a sign carrying a noncommercial message. Offsite noncommercial signs, therefore, would not be prohibited. This result is consistent with Morrow's enforcement of its ordinance.

Id. at 1119. Thus, the Eleventh Circuit upheld the Morrow ordinance, and reasoned that the onsite-offsite distinction does not impermissibly restrain noncommercial speech because "[t]he definition of billboard as an offsite advertising sign does not include noncommercial speech as such speech is onsite." *Id.*

National would like this Court to disregard the binding precedent set forth by the Eleventh Circuit in *Southlake,* and instead enter judgment as a matter of law for National pursuant to the First Circuit's rationale in *Ackerley* and three decisions[62] rendered by other judges in this district.[63] However, National fails to recognize that its reliance on *Ackerley* and the three district cases is misplaced. As explained above, the Eleventh Circuit has explicitly rejected the First Circuit's reasoning in *Ackerley* that noncommercial speech is almost always offsite, and instead unambiguously adopted the *opposite view* that all noncommercial speech is onsite. *Southlake,* 112 F.3d at 1118-19.

Moreover, National's reliance on Judge Middlebrooks's opinion, in *Florida Outdoor Adver., LLC v. Boynton Beach,* 182 F. Supp. 2d 1201 (S.D. Fla. 2001), Judge Ungaro-Benages's Omnibus Order in *Wilton Manors Street Sys. v. Wilton Manors,* No. 00-6186-CIV-UNGARO-BENAGES (S.D. Fla. Dec. 5, 2000), and Judge Zloch's Omnibus Order in *Coral Springs Street Sys. v. Sunrise, Florida,* No. 01-7951-CIV-ZLOCH (S.D. Fla. Feb. 21, 2003), is also misplaced. In its current Motion, National argues that this Court should strike down the City's Zoning Ordinance as unconstitutional on the basis that Judges Middlebrooks, Ungaro-Benages, and Zloch, in cases dealing with sign

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[62] Judge Middlebrooks's opinion in *Florida Outdoor Adver., LLC v. Boynton Beach,* 182 F. Supp. 2d 1201 (S.D. Fla. 2001), Judge Ungaro-Benages's Omnibus Order in *Wilton Manors Street Sys. v. Wilton Manors,* No. 00-6186-CIV-UNGARO-BENAGES (S.D. Fla. Dec. 5, 2000), and Judge Zloch's Omnibus Order in *Coral Springs Street Sys. v. Sunrise, Florida,* No. 01-7951-CIV-ZLOCH (S.D. Fla. Feb. 21, 2003)

[63] (Pl.'s Mem. In Supp. of Mot. for Summ. J., 01-3039-CIV DE # 117, at 4 n.7, 7-8.)

codes "which contained very similar provisions to the City's Sign Code provisions at issue," found such codes to be facially unconstitutional.[64]

After reviewing of these opinions, this Court notes that not one of them references *Southlake,* perhaps because the parties failed to bring it to the courts' attention. Nonetheless, this Court concludes that clear and concrete parallels cannot be drawn between the sign codes in each of these cases and the Zoning Ordinance in the instant case.[65] Each sign code and zoning ordinance contains specific and precise language. In considering facial challenges to an ordinance, a court's interpretation of the ordinance's constitutionality, or lack thereof, turns on that language. When evaluating such challenges on First Amendment grounds, each court must render decisions on a case-by-case basis, after careful consideration of the specific provisions of the ordinance in question. As a result, this Court is not dissuaded from applying its own interpretation of *Southlake* to the facts of the instant case merely because Judges Middlebrooks, Ungaro-Benages, and Zloch (whose opinions in those cases make no reference to *Southlake*) found that the language of the individual sign codes in their cases violated the First Amendment.

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[64] (Pl.'s Mem. In Supp. of Mot. for Summ. J., 01-3039-CIV DE # 117, at 5.)

[65] Copies of the sign codes at issue in those cases are not attached to the opinions, and the exact language of the ordinance upon which the courts' conclusions are based is not included in the opinions. Therefore, this Court is not able to make a comparison between the exact language of those codes and the Ordinance in the instant case.

Thus, contrary to National's contention, this Court must rely upon and apply the reasoning espoused in *Southlake* because the case is binding and directly on point in the instant case. Here, like the plaintiff in *Southlake,* National argues that the Zoning Ordinance is unconstitutional because its ban of offsite signs prohibits noncommercial messages from being displayed.[66] The Ordinance defines an offsite sign as "a sign other than on [sic] onsite sign." MIAMI, FLA., ZONING ORDINANCE §2502 at 712. The definitions of onsite and offsite signs are ambiguous in that the signs are not qualified by their commercial or noncommercial nature. *See Id.* at 712, 713. However, according to the Eleventh Circuit's reasoning in *Southlake,* "all noncommercial speech is onsite." 112 F.3d at 1117-18.

Therefore, this Court finds that: (1) the Ordinance's ban against offsite signs cannot be read to mean that noncommercial messages are prohibited because noncommercial speech is always onsite; and (2) the definition of onsite signs can be read to include noncommercial messages, so that the provisions providing for "onsite signs only" specifically allow noncommercial messages. This construction interprets all ambiguities in a manner that avoids constitutional infirmities and as such is in accordance with the Eleventh Circuit's holding in *Southlake.* Accordingly, this Court upholds the Zoning Ordinance's prohibition of offsite signs because its onsite-offsite distinction does not unconstitutionally favor commercial speech over noncommercial speech.

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[66] (Pl.'s Mem. In Supp. of Mot. for Summ. J., 01-3039-CIV DE # 117, at 4-6.)

b. The Zoning Ordinance does not unconstitutionally discriminate between different types of noncommercial speech

In addition, National argues that the Zoning Ordinance is void because 57 different provisions throughout the Ordinance unconstitutionally favor some forms of noncommercial speech over others. *See supra* note 44. These provisions can be divided into two separate groups: (1) provisions regulating signs in the various zoning and special districts ("the regulations"), and (2) provisions exempting certain signs from the permitting process ("the exemptions").[67] *See infra* note 71.

(i) The regulations do not unconstitutionally favor different types of noncommercial speech

National cites *Metromedia* in support of its challenge to the regulations. However, the facts and holding of *Metromedia* are easily distinguishable from the instant case. As discussed above, the ordinance in *Metromedia* prohibited all offsite noncommercial messages, but delineated 12 specific exceptions.[68] 453 U.S. at 494-96, 514. The Supreme Court found the exceptions unconstitutional. *Id.*

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[67] Because National's current action presents a facial challenge on First Amendment grounds to the City's Zoning Ordinance, this Court has specifically referred to each of the challenged provisions. A review of the provisions regulating signs in the various districts reveals that the language of those provisions is repetitive throughout the Ordinance for the different districts. Therefore, this Court will specifically address and analyze the regulations for the C-1 district as representative of those provisions for the sake of clarity and to avoid repetition.

[68] *See supra* note 50.

at 514. In so doing, the Court noted that except for the 12 types of signs specifically allowed, "[n]o other noncommercial or ideological signs meeting the structural definition [were] permitted, regardless of their effect on traffic safety or esthetics." *Id.* Thus, the Court held that the ordinance violated the First Amendment because "[a]lthough the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Id.* at 514.

Here, unlike in *Metromedia,* the Ordinance does not specifically ban noncommercial speech. On the contrary, in light of *Southlake,* the Ordinance's allowance of onsite signs specifically provides for noncommercial messages. *See supra* Part V.B.2.a. Nevertheless, the City may constitutionally limit the size and placement of sign *structures* so long as the signs are not restricted based on their content or viewpoint. This Court has carefully reviewed the challenged provisions and concludes that the provisions regulating sign structures in the various districts (i.e., section 401 and Article 9) are content-neutral zoning regulations intended to regulate structures, rather than to suppress speech. The C-1 Restricted Commercial district is one of the numerous zoning districts that is regulated by the provisions set forth in section 401.[69] In the C-1 district

[69] The Ordinance sets forth the following sign regulations for the C-1 Restricted Commercial district:

> Onsite signs only shall be permitted in these districts, subject to the following requirements and limitations. Except as otherwise provided, such signs may be illuminated but shall not be animated or flashing. At retail or service establishments, in addition to identifying the principal business,

(Continued on following page)

commodity or service, such signs may devote not more than half of their actual aggregate to the advertising of subsidiary products sold or services rendered on the premises.

1. Community or neighborhood bulletin boards or kiosks shall be permissible as provided at section 925.3.10.

2. Construction signs; not be [to] exceed one (1) construction sign or thirty (30) square feet in area, for each lot line adjacent to a street.

3. Development signs, except where combined with construction signs, shall be permissible only by Class I Special Permit as provided at section 925.3.8.

4. Directional signs, which may be combined with address signs but shall bear no advertising matter, may be erected to guide to entrances, exits, or parking areas, but shall not exceed five (5) square feet in surface area.

5. Ground or freestanding signs, limited to one (1) sign structure with not to exceed two (2) sign surfaces, neither of which shall exceed forty (40) square feet in sign area, for each establishment or for each fifty (50) feet of store frontage. Permitted sign area shall be cumulative, but no sign surface shall exceed one hundred (100) square feet. Maximum height limitation shall be twenty (20) feet including embellishments, measured from the crown of the nearest adjacent local or arterial street, not including limited access highways or expressways, provided, however, that the zoning administrator at his discretion may increase the measurement of the crown by up to five (5) feet to accommodate unusual or undulating site conditions.

6. Marquee signs, limited to one (1) per establishment and three (3) square feet in area.

7. Projecting signs (other than marquee signs) shall be limited to one (1) sign structure with not to exceed two (2) sign surfaces, neither of which shall exceed forty (40) square feet in sign area; provided, however, that such permissible sign area shall be increased in C-1 districts to eighty (80) square feet where maximum projection from the face of the building is two (2) feet or less, sixty (60) square feet where projection is more than two (2) and less than three (3) feet, and forty (40) square feet where projection is at least three (3), but not more than four (4) feet.

(Continued on following page)

sign structures have certain height, square footage and placement requirements. *See supra* note 54. There is no indication that the challenged portions of section 401 and Article 9 restrict the content of the sign structures. Therefore, unlike the exceptions in *Metromedia,* the challenged provisions in this case do not exempt certain signs from an otherwise total ban.

In further support of this challenge to the regulations, National targets the provisions of the Ordinance relating to the temporary placement of political and civic campaign signs. National argues that it is unconstitutional for the Ordinance to allow those signs but disallow other non-commercial messages. However, this Court does not interpret the Ordinance to mean that temporary political

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8. Real estate signs, limited to one (1) per street frontage and not to exceed half the area permissible for the same type of permanent sign on the premises.

9. Temporary civic and political campaign sins [sic] are allowed, subject to the exceptions, limitations and responsibilities of subsections 925.3.11, 925.3.12 and 925.3.13 respectively.

10. Wall signs, limited to two and one-half (2½) square feet of sign area for each lineal foot of wall fronting on a street is [sic] any portion of such sign is below fifteen (15) feet above grade. For each foot that the lowest portion of such sign exceeds fifteen (15) feet, permitted sign area shall be increased one (1) percent. Not more than three (3) such signs shall be permitted for each frontage on which area calculations are based, but one (1) of these may be mounted on a side wall.

11. Window signs, painted or attached, shall not exceed twenty (20) percent of the glassed area of the window in which placed. Number of such signs is not limited by these regulations, but aggregate area shall be included as part of aggregate wall sign area, as limited above.

MIAMI, FLA. ZONING ORDINANCE § 401 at 128-28.

and civic campaigns signs are the only noncommercial signs allowed in those districts. Instead, the Ordinance merely requires removal of such signs upon the conclusion of the relevant election. Therefore, this Court finds that these provisions restrict rather than empower speech related to political and civic campaigns by requiring their prompt removal at a certain point in time.

Even though this interpretation of the provisions now appears to restrict political speech, at least two courts have held that a city may constitutionally set a reasonable time limit for residents to remove election-related signs after the conclusion of an election. *Granite State Outdoor Adver.*, 213 F. Supp. 2d at 1337; *see also Collier v. City of Tacoma*, 854 P.2d 1046, 1057 (Wash. 1993). This finding is justified by the fact that political and civic campaign signs cease to exist as speech at the conclusion of the election.[70] Therefore, cities may constitutionally enforce such removal requirements in order to advance esthetic interests, which is exactly the case here.

Accordingly, this Court finds that the provisions regulating signs in the various zoning districts (e.g., section 401 and Article 9) do not unconstitutionally favor commercial over noncommercial speech.

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[70] Signs supporting particular campaigns during an election must be displayed during a specified and limited time period, otherwise the message is no longer protected speech because it loses its purpose (e.g., displaying a "Clinton/Gore '96" Election sign in 1997).

(ii) The exemptions do not unconstitutionally express a preference for certain types of noncommercial speech over others

National cites the exemption provisions[71] to support its argument that the Ordinance favors some noncommercial messages over others. However, binding Eleventh Circuit precedent requires the Court to reject this argument. In *Messer v. City of Douglasville*, the Eleventh Circuit upheld a permit exemption scheme[72] that was very similar to the scheme at issue in this case. 975 F.2d 1205, 1511 (11th Cir. 1992). In that case, the plaintiff argued that, as in *Metromedia*, "the [Douglasville] ordinance distinguishe[d] between different types of noncommercial messages, and *exempt[ed] certain noncommercial messages from permitting requirements* based on their content, resulting in an unconstitutional content-based restriction

[71] Section 925.3 exempts the following signs from permit requirements: (1) government signs; (2) national flags and flags of political subdivisions; (3) decorative flags, bunting, decorations; (4) symbolic flags, award flags, house flags; (5) address, notice, directional and warning signs; (6) vehicle signs; (7) real estate signs; (8) certain construction and development signs; (9) balloons; (10) signs posted on community or neighborhood bulletin boards or kiosks; (11) temporary civic campaign signs; (12) temporary political campaign signs; (13) cornerstones, memorials, or tablets; (14) mailboxes; (15) signs on bus shelters, benches, trash receptacles; (16) weather flags; (17) church identification signs; (18) freestanding perimeter wall signs identifying developments.

[72] The Douglasville ordinance exempting the following signs from the permitting process: "1) wall sign per building side announcing the business and attached to the side of the building, 2) one real estate "for sale" sign per property frontage, 3) one bulletin boards [sic] located on religious, public, charitable or educational premises, 4) one construction identification sign, and 5) directional traffic signs containing no advertisements." *Messer*, 975 F.2d at 1511.

on the noncommercial messages not so exempted." *Id.* at 512 [sic] (emphasis added). In analyzing the plaintiff's argument, the court noted that in *Metromedia* the "plurality struck the San Diego ordinance because it had a system of exceptions to the general ban on non-commercial billboards which violated the First Amendment." *Id.* at 1512. However, the court distinguished the exemptions in *Messer* by stating that "the Douglasville exemptions are not exemptions from a general ban of all off-premise billboards, but from permitting requirements and permits fees." *Id.* at 1513. Moreover, the court stated that the exemptions do not express a preference between different types of noncommercial messages, and in fact "favor[] noncommercial over commercial messages by expressly deregulating messages by noncommercial speakers." *Id.* Here, like the ordinance in *Messer,* exemption from the permitting process does not constitute an exception to a general ban of noncommercial messages. *See supra* note 71. Therefore, in accordance with *Messer,* this Court rejects National's arguments with regard to all but one of the permit exemptions.

The lone permit exemption not explicitly protected by *Messer* is the exemption for temporary political and civic campaign signs.[73] *See supra* note 71. Political speech lies at the core of the First Amendment and is afforded its broadest protection. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 346-47 (1995) (quoting *Roth v. United States,* 347 U.S. 476, 484 (1957)); *see also Buckley v. Valeo,* 424 U.S. 1, 14 (1976). To require permits for campaign related signs would ignore the substantial time pressure that pervades

[73] None of the exemptions at issue in *Messer* addressed political, historical or religious signs. 975 F.2d at 1513.

every campaign. Thus, it is only by allowing this speech to appear in an accelerated fashion that the Ordinance is able to give such speech the protection it warrants. Had the City required permits for these temporary signs, citizens would undoubtedly have sued the City for violating their First Amendment rights to political speech. If this Court accepts National's argument and strikes the permit exemption for temporary political and civic campaign signs, the Ordinance would accord First Amendment rights less protection, not more.

Accordingly, this Court finds that the permit exemption scheme as set forth in the Ordinance does not unconstitutionally favor some forms of noncommercial speech over other. Rather, the Ordinance as it now stands gives the core of First Amendment speech the protection it deserves.

3. The Ordinance is a constitutional content-neutral zoning ordinance intended to regulate structures, not speech

National argues that this Ordinance must be struck down as an unconstitutional content-based restriction on speech pursuant to the Supreme Court's reasoning in *Metromedia*, the seminal case involving First Amendment issues and billboard signs. This Court disagrees. There is no question that First Amendment precedent, including *Metromedia*, clearly establishes the general rule that the government cannot "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Taxpayers for Vincent*, 466 U.S. at 804. However, this general rule is not applicable in cases where "there is not even a hint of bias or censorship in the [c]ity's enactment or enforcement of [the] ordinance." *Id.* This is particularly

true where "[t]he text of the ordinance is neutral-indeed it is silent-concerning any speaker's point of view . . . . " *Id.* Instead, such viewpoint neutral ordinances must be evaluated pursuant to the framework set forth in *United States v. O'Brien,* 391 U.S. 367 (1968), and reaffirmed in *Taxpayers for Vincent,* 466 U.S. at 804-05, a post-*Metromedia* opinion. In *O'Brien,* the Court held that a viewpoint-neutral ordinance is constitutional if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) any incidental restriction on First Amendment rights is no greater than what is essential to further that interest. 391 U.S. at 377.

After carefully considering each of National's arguments, this Court concludes that the City's Zoning Ordinance constitutes a content-neutral regulation intended solely to regulate structures, not to suppress speech. Here, the language of the Ordinance sets forth specific objectives the City set out to attain through its implementation. The Ordinance delineates the different zoning regulations applicable in each district and the various zoning procedures and processes governing application of those regulations. Thus, in light of the previous in-depth analysis, this Court finds that none of the provisions express even a hint of viewpoint bias or discrimination, and therefore the Ordinance constitutes a content-neutral regulation.

Moreover, the Ordinance passes constitutional muster under the *O'Brien* test as a content-neutral regulation. First, there is no question that the City can constitutionally enact and enforce a zoning ordinance intended to regulate land use within its boundaries. Next, the previous analysis clearly establishes that the second and third

prongs of the *O'Brien* test are satisfied. *See* discussion *supra* Parts V.B.1-2. Specifically, the City has a substantial interest in maintaining traffic safety and promoting aesthetics and these interests are entirely unrelated to the suppression of speech.[74] *See Metromedia*, 453 U.S. at 507-08; *see also supra* note [sic]. Moreover, by regulating the size, placement, and structural requirements of buildings and sign structures, the City is directly advancing those interests that are entirely unrelated to the suppression of speech. Finally, this Court finds that the effect that the Ordinance does have on speech, particularly offsite commercial speech, is no greater than necessary to accomplish the City's purposes. The City has determined that offsite billboards constitute a traffic safety hazard and an esthetics problem in specified zoning districts throughout the City of Miami. The Supreme Court in *Metromedia* clearly held that a city has a right to arrive at such conclusion. 453 U.S. at 511-12. Here, the tangible medium of expression (i.e., billboards), rather than the content of the billboard, is what constitutes the problem. Thus, the provisions in the Ordinance that prohibit such billboards in certain areas aim only to promote the City's interests in traffic safety and esthetics, and are no broader than necessary to achieve that end. *See supra* Part V.B.3. The City has determined that its interests should yield only to onsite commercial speech and noncommercial speech, and the Supreme Court has condoned such a determination. *See Metromedia*, 453 U.S. at 511-12. Accordingly, this

[74] This Court finds that the City's purpose as clearly expressed in section 120 of the Ordinance is completely unrelated to the suppression of speech. *See supra* note 2. Moreover, this record is devoid of any evidence showing that the Ordinance as applied is intended to suppress speech.

Court finds that the Zoning Ordinance constitutes a constitutional content-neutral zoning regulation.

4. National's challenge that the Ordinance lacks procedural safeguards

Lastly, National argues that the Ordinance is a classic speech licensing scheme that must be struck down as unconstitutional because it lacks (1) clarity with regard to the discretion of the City officials, and (2) the necessary procedural safeguards set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965).[75] In *Freedman*, the Supreme Court struck down a state law that required motion pictures to obtain a license prior to release. 380 U.S. at 58. The Board that issued the licenses had the exclusive authority to deny a license on the basis that the film was "obscene" or "'tend[ed], in the judgment of the Board, to debase or corrupt morals or incite to crimes.'" *Id.* at 58, n.2. In that case, the Court explicitly held that for such a speech licensing scheme to be constitutional, it must have the following procedural requirements in place: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990) (citing *Freedman*, 380 U.S. 58-60.) However, in *Thomas v. Chicago Park Dist.*, the Supreme Court clearly stated that the stringent

[75] (Pl.'s Mem. In Supp. of Mot. for Summ. J. 01-3039-CIV DE # 117, at 12-16.)

requirements set forth in *Freedman* do not apply when a permit scheme is content-neutral because such schemes are less threatening to the First Amendment. 112 S. Ct. 775, 779 (2002). Instead, the Court held that for such a scheme to be constitutional, it need only (1) limit the discretion of the licensing officer, and (2) render that decision "subject to effective judicial review." *Id.* at 780 (citing *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

Here, the Ordinance at issue is a content-neutral zoning regulation that regulates structures, not speech. *See supra* Part V.B.3. Its permit scheme aims to enforce the various structural requirements (e.g., height, lighting, square footage, etc.) set forth in the Ordinance, but does not regulate the speech that can be displayed on structures on the basis of its content or specific viewpoint. Thus, contrary to National's assertion, the Ordinance need not satisfy the very stringent *Freedman* requirements.

In light of this distinction, the Ordinance contains sufficient procedural requirements to survive constitutional review. First, City officials cannot exercise unbridled discretion. On the contrary, an official's decision to either grant or deny a permit is expressly limited by the requirements set forth in the Ordinance. MIAMI, FLA., ZONING ORDINANCE §§ 2101.2, 2102.2, at 607-08. Specifically, an official may only deny a permit to build a structure if the structure fails to meet the concrete and specific requirements clearly set forth in the Ordinance for that specific zoning district. *Id.* Officials have no discretion to deny a permit if those specific requirements are met. *Id.* Moreover, the Ordinance also provides for effective judicial review of a City official's decision to either grant or deny a permit. *Id.* §§ 1800-1807 at 557-58. Under the Ordinance, if a permit is denied, the affected applicant may appeal to

a zoning board that must grant a hearing within 45 days of the appeal. *Id.* § 1804 at 557. Thereafter, the board's decision itself may be appealed to the city commission, and ultimately, to the Florida courts. *Id.* §§ 2001-2005 at 591. Moreover, in order to assure adequate appellate review, the city official must give specific reasons for the permit denials. *Id.* § 2102.2 at 608.

For these reasons, the Zoning Ordinance's content-neutral permit scheme is constitutional pursuant to *Thomas*. Accordingly, the Court rejects National's argument that the Ordinance constitutes an impermissible speech licensing scheme. Instead, the Court finds that the Zoning Ordinance is a content-neutral permit scheme that adequately protects the First Amendment rights of all permit applicants.

VI. Conclusion

The Supreme Court has clearly stated that while billboards constitute "a well-established medium of communication, used to convey a broad range of different kinds of messages," the fact remains that "whatever its communicative function, the billboard remains a 'large, immobile, and permanent structure which like other structures is subject to . . . regulation." *Metromedia,* 453 U.S. at 501, 502 (quoting *Metromedia v. San Diego,* 26 Cal. 3d 848, 870 (Cal. 1980)). Once the dust surrounding National's First Amendment claims settles, it becomes clear that this case concerns one thing: National's commercial interest. This Court thinks that it would be counterintuitive to adopt National's position and issue a ruling intended to benefit and protect noncommercial speech, when its effect would actually be to benefit a billboard company whose sole interest and motivation in initiating this litigation is to ensure its commercial well-being.

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that National's Second Motion for Summary Judgment (DE # 116) be, and the same is hereby, DENIED. It is further

ORDERED and ADJUDGED that the City's Second Motion for Summary Judgment (DE # 112) be, and the same is hereby, GRANTED.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 25th day of September, 2003.

/s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15516-GG

NATIONAL ADVERTISING CO., a Delaware corporation,

Plaintiff-Appellant,

versus

CITY OF MIAMI, a Florida municipality,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed May 20, 2005)

Before: EDMONDSON, Chief Judge, WILSON, Circuit Judge, and RESTANI*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NATIONAL ADVERTISING COMPANY, a Delaware corporation,

Plaintiff,

vs.

CITY OF MIAMI, a Florida municipality,

Defendant. /

CONSOLIDATED CASE NOS. 01-3039-CIV-KING and 02-20556-CIV-KING

DEFENDANT'S NOTICE OF FILING

Defendant City of Miami hereby gives notice of filing the attached document entered as Exhibit A by plaintiff National Advertising Company at the August 27, 2003 hearing on the parties' cross motions for summary judgment.

Respectfully submitted,

HOGAN & HARTSON, LLP
Attorneys for the City of Miami
Mellon Financial Center
1111 Brickell Avenue, Suite #1900
Miami, Florida 33131
Telephone: (305) 459-6500
Facsimile: (305) 459-6550

By: /s/ Lori L. Piechura for
Parker D. Thomson
Fla. Bar No. 081225
Carol A. Licko
Fla. Bar No. 435872

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail this 8th day of September 2003, to:

Thomas R. Julin, Esquire
Hunton & Williams
Mellon Financial Center, Suite 2500
1111 Brickell Avenue
Miami, Florida 33131

/s/ Lori L. Piechura
Lori L. Piechura

STATE OF FLORIDA)
)
COUNTY OF MIAMI-DADE)
)
CITY OF MIAMI)

I, WALTER J. FOEMAN, City Clerk of the City of Miami, Florida, and keeper of the records thereof, do hereby certify that the attached and foregoing pages, numbered 1 through 291, inclusive, constitute a true and correct copy of the Zoning Ordinance of the City of Miami Florida, as amended through July 27, 2000.

IN WITNESS WHEREOF, I hereunto set my hand and impress the official seal of the City of Miami, Florida this 17th day of ***July, 2001.***

WALTER J. FOEMAN
City Clerk
Miami, Florida

By: /s/ [Illegible]
Deputy Clerk

(OFFICIAL SEAL)

ZONING ORDINANCE

CITY OF

MIAMI, FLORIDA

PUBLISHED BY ORDER OF THE CITY COMMISSION, 1991

A Part of the Code of Ordinances of the City of Miami

---

* * *

Sec. 240. Erection or maintenance of unauthorized signs prohibited.

No sign shall be maintained, constructed, displayed, illuminated, located, or dimensioned except in accordance with the provisions of this ordinance.

Sec. 401. Schedule of district regulations.

CS Conservation.

Sign Regulations:

Only identification and directional signs by Class II Special Permit.

PR Parks, Recreation and Open Space.

* * *

Sign Regulations:

Only name of facility and directional signs by Class I Special Permit.

R-1 Single-Family Residential.

* * *

Sign Regulations:

In connection with each dwelling unit and all other uses:

1. Address signs, not to exceed one (1) for each dwelling unit or other use for each lot line adjacent to a street, or two (2) square feet in area, except as provided below.

2. Notice, directional and warning signs, not to exceed one (1) for each dwelling unit or other use for each lot line adjacent to a street, or two (2) square feet in area, provided that, where such signs are combined with address signs, maximum total area shall not exceed three (3) square feet.

Such signs, if freestanding, shall not exceed three (3) feet in height, be closer than ten (10) feet to any adjacent lot, or be closer than two (2) feet to any street line. Such

signs shall not be illuminated. (For signs related to home occupations, see section 906.5(d).)

In connection with child daycare centers: Not to exceed one (1) identification sign per establishment with a maximum area of two (2) square feet.

In connection with subdivisions, developments, neighborhoods or similar areas: Not to exceed one (1) permanent identification sign, or ten (10) square feet in area, per principal entrance. Such signs shall not be illuminated or internally illuminated.

In connection with advertising real estate upon which posted for sale, rent or lease: Not to exceed one (1) real estate sign, or four (4) square feet in area, for each lot line adjacent to a street. Such signs shall be nonilluminated.

In connection with active and continuing new construction work in progress: Except for PD development, construction signs shall not exceed one (1) construction sign, or six (6) square feet in area, for each lot line adjacent to a street. Such signs shall not be illuminated. PD-H (article 5) construction signs shall not exceed twenty (20) square feet in area, one (1) for each lot line adjacent to a street. Development signs shall not be permitted except in conjunction with such construction signs or by Class I Special Permit as provided in section 925.3.8.

In connection with places of worship, primary and secondary schools: As for O.

Temporary political or civic campaign signs: Allowed subject to the exceptions, limitations and responsibilities of subsections 925.3.11, 925.3.12 and 925.3.13.

R-2 Two-Family Residential.

* * *

Sign Regulations:

Same as for R-1 Single-Family Residential.

R-3 Multifamily Medium-Density Residential.

* * *

Sign Regulations:

In connection with each dwelling unit and all other uses:

1. Address signs, not to exceed one (1) for each dwelling unit or other use for each lot line adjacent to a street, or two (2) square feet in area, except as provided below.

2. For each lot line adjacent to a street, one (1) wall sign not exceeding forty (40) square feet in area, or one (1) projecting sign with combined surface area not exceeding forty (40) square feet, and one (1) address and/or directional sign, not exceeding twenty (20) square feet. Such address and/or directional, notice or warning sign, if freestanding, shall not be closer than six (6) feet to any adjacent lot line or be closer than two (2) feet to any street line.

3. Notice, directional and warning signs, not to exceed one (1) for each dwelling unit or other use for each lot line adjacent to a street, or two (2) square feet in area, provided that, where such signs are combined with address signs, maximum total

area shall not exceed three (3) square feet. Address, notice, directional warning signs, if freestanding, shall not exceed three (3) feet in height, be closer than ten (10) feet to any adjacent lot, or be closer than two (2) feet to any street line.

Area of permitted wall signs may be increased two and one-half (2½) square feet for each foot above the first ten (10) feet of building height from grade at the bottom of the wall (averaged if sloping or irregular) to the bottom of the sign.

Child care centers: Same as permitted in R-1.

Community or neighborhood bulletin boards or kiosks: Shall be permissible only by Class I Special Permit, as provided at section 925.3.10.

Construction: Not to exceed one (1) construction sign, or thirty (30) square feet in area for each lot line adjacent to a street. Development signs shall not be permitted except in conjunction with such construction signs or by Class I Special Permit as provided in section 925.3.8.

Home occupations: See Section 906.5(d).

Real estate advertising for sale, rent or lease: Not to exceed one (1) real estate sign, or four (4) square feet in area, for each lot line adjacent to a street.

Subdivision, developments, neighborhoods or similar areas: Not to exceed one (1) permanent identification sign or ten (10) square feet in area, per principal entrance.

Temporary political and civic campaign signs: Allowed subject to the exceptions, limitations and responsibilities of subsections 925.3.11, 925.3.12 and 925.3.13

R-4 Multifamily High-Density Residential.

* * *

Sign Regulations:

Same as in R-3 district.

O Office.

* * *

Sign Regulations:

As for R-4, except as specified below:

Limitations on signs in relation to clinic uses therein shall apply to all office or clinic uses in this district. In addition, for each lot line adjacent to a street, address and/or directional sign, not exceeding twenty (20) square feet, such address and/or directional, notice or warning sign, if free-standing, shall not be closer than six (6) feet to any adjacent lot or closer than two (2) feet to any street line.

Area of permitted wall signs may be increased two and one-half (2½) square feet for each foot above the first ten (10) feet of building height from grade at the bottom of the wall (averaged if sloping or irregular) to the bottom of the sign.

Community or neigh borhood bulletin boards or kiosks shall be permissible only by Class I Special Permit, as provided at section 925.3.10.

Development signs, except where combined with construction signs, shall be permissible only by Class I Special Permit as provided at section 925.3.8.

Signs for hotel uses shall be subject to Class II Special Permit review. The Class II Special Permit shall give due consideration to the orientation of said signs to ensure that they are oriented away from adjacent residential uses so as to minimize the potential adverse effects resulting from lighting spillover. Signage for hotels shall conform to the following guidelines:

1. Directional signs, which may be combined with address signs but shall bear no advertising matter, may be erected to guide toward entrances, exits, or parking areas, but shall not exceed five (5) square feet in surface area. Such signs shall be permanent, weather resisting fixtures well anchored to the ground so as not to be readily removable and shall stand alone, not be attached to other fixtures or plantings.

2. Ground or monument signs, excluding pole signs, limited to one (1) sign structure with not to exceed two (2) sign surfaces neither of which shall exceed forty (40) square feet in sign area. One (1) such sign shall be allowed for each one hundred (100) feet of frontage. Such signs shall consist of a solid and opaque surface which shall contain all lettering and/or graphic symbols, none of which shall be internally illuminated. Maximum height limitation shall be ten (10) feet including embellishments, measured from the crown of the nearest adjacent local or arterial street, not including limited access highways or expressways, provided, however, that upon finding that there are unusual or undulating site conditions the zoning administrator may increase the measurement of the crown by up to five (5) feet to accommodate these conditions.

3. Wall signs, limited to one (1) square foot of sign area for each lineal foot of wall fronting on a street. Not more than three (3) such signs shall be permitted per hotel. No signs will be permitted on frontages which face residentially zoned property within a radius of one thousand (1,000) feet.

G/I Government and Institutional.

* * *

Sign Regulations:

Onsite signs only shall be permitted in these districts, subject to Class II Special Permit procedures and review as set forth in Articles 13 and 15 of this zoning ordinance; as well as the following requirements and limitations.

Except as otherwise provided, such signs may be illuminated but shall not be animated or flashing. At retail or service establishments, in addition to identifying the principal business, commodity or service, such signs may devote not more than half of their actual aggregate area to the advertising of subsidiary products sold or services rendered on the premises.

1. Construction signs; not to exceed one (1) construction sign or thirty (30) square feet in area, for each lot line adjacent to a street.

2. Development signs, except where combined with construction signs, shall be permissible subject to the provisions as provided at section 925.3.8.

3. Directional signs, which may be combined with address signs but shall bear no advertising matter, may be erected to guide to entrances, exits, or parking areas, but shall not exceed five (5) square feet in surface area.

4. Ground or freestanding signs, limited to one (1) sign structure with not to exceed two (2) sign surfaces, neither of which shall exceed forty (40) square feet in sign area, for each establishment or for each fifty (50) feet of street frontage. Permitted sign area shall be cumulative, but no sign surface shall exceed one hundred (100) square feet. Maximum height limitation shall be twenty (20) feet including embellishments, measured from the crown of the nearest adjacent local or arterial street, not including limited access highways or expressways, provided, however, that the zoning administrator may increase the measurement of the crown by up to five (5) feet to accommodate unusual or undulating site conditions upon finding that such conditions exist.

5. Projecting signs (other than marquee signs) shall be limited to one (1) sign structure with not to exceed two (2) sign surfaces, neither of which shall exceed forty (40) square feet in sign area.

6. Real estate signs, limited to one (1) per street frontage and not to exceed half the area permissible for the same type of permanent sign on the premises.

7. Temporary civic and political campaign signs are allowed, subject to the exceptions, limitations and responsibilities of subsections 925.3.11, 925.3.12 and 925.3.13 respectively.

8. Wall signs, limited to two-and-one-half (2½) square feet of sign areas for each lineal foot of wall fronting on a street if any portion of such sign is below fifteen (15) feet above grade. For each foot that the lowest portion of such sign exceeds fifteen (15) feet, permitted sign area shall be increased one (1) percent. Not more than three

(3) such signs shall be permitted for each frontage on which area calculations are based, but one of these may be mounted on a side wall.

9. Window signs, painted or attached, shall not exceed twenty (20) percent of the glassed area of the window in which placed. Number of such signs is not limited by these regulations, but aggregate area shall be included as part of aggregate wall sign area, as limited above.

C-I Restricted Commercial.

* * *

Sign Regulations:

Onsite signs only shall be permitted in these districts, subject to the following requirements and limitations. Except as otherwise provided, such signs may be illuminated but shall not be animated or flashing. At retail or service establishments, in addition to identifying the principal business, commodity or service, such signs may devote not more than half of their actual aggregate to the advertising of subsidiary products sold or services rendered on the premises.

1. Community or neighborhood bulletin boards or kiosks shall be permissible as provided at section 925.3.10.

2. Construction signs; not be [to] exceed one (1) construction sign or thirty (30) square feet in area, for each lot line adjacent to a street.

3. Development signs, except where combined with construction signs, shall be permissible only by Class I Special Permit as provided at section 925.3.8.

4. Directional signs, which may be combined with address signs but shall bear no advertising matter, may be erected to guide to entrances, exits, or parking areas, but shall not exceed five (5) square feet in surface area.

5. Ground or freestanding signs, limited to one (1) sign structure with not to exceed two (2) sign surfaces, neither of which shall exceed forty (40) square feet in sign area, for each establishment or for each fifty (50) feet of street frontage. Permitted sign area shall be cumulative, but no sign surface shall exceed one hundred (100) square feet. Maximum height limitation shall be twenty (20) feet including embellishments, measured from the crown of the nearest adjacent local or arterial street, not including limited access highways or expressways, provided, however, that the zoning administrator at his discretion may increase the measurement of the crown by up to five (5) feet to accommodate unusual or undulating site conditions.

6. Marquee signs, limited to one (1) per establishment and three (3) square feet in area.

7. Projecting signs (other than marquee signs) shall be limited to one (1) sign structure with not to exceed two (2) sign surfaces, neither of which shall exceed forty (40) square feet in sign area; provided, however, that such permissible sign area shall be increased in C-1 districts to eighty (80) square feet where maximum projection from the face of the building is two (2) feet or less, sixty (60) square feet where projection is more than two (2) and less than three (3) feet, and forty (40) square feet where projection is at least three (3), but not more than four (4) feet.

8. Real estate signs, limited to one (1) per street frontage and not to exceed half the area permissible for the same type of permanent sign on the premises.

9. Temporary civic and political campaign signs are allowed, subject to the exceptions, limitations and responsibilities of subsections 925.3.11, 925.3.12 and 925.3.13 respectively.

10. Wall signs, limited to two and one-half (2½) square feet of sign area for each lineal foot of wall fronting on a street if any portion of such sign is below fifteen (15) feet above grade. For each foot that the lowest portion of such sign exceeds fifteen (15) feet, permitted sign area shall be increased one (1) percent. Not more than three (3) such signs shall be permitted for each frontage on which area calculations are based, but one (1) of these may be mounted on a side wall.

11. Window signs, painted or attached, shall not exceed twenty (20) percent of the glassed area of the window in which placed. Number of such signs is not limited by these regulations, but aggregate area shall be included as part of aggregate wall sign area, as limited above.

C-2 Liberal Commercial.

* * *

Sign Regulations:

Signs, illuminated or nonilluminated, flashing or nonflashing, or animated (except as otherwise provided) are permitted as accessory uses and, in the case of offsite signs (including those in connection with the outdoor advertising business), as principal uses, subject to the provisions of sections 925 and 926 and the following

requirements and limitations. Onsite signs shall be limited as to subject matter as for C-1.

Signs shall be permitted as for C-1 except:

1. Wall signs, onsite, limited to three and one-half (3½) square feet of sign area for each lineal foot of wall fronting on a street if any portion of such sign is below fifteen (15) feet above grade. For each foot that the lowest portion of such sign exceeds twenty-five (25) feet, permitted sign area shall be increased one (1) percent up to a maximum height of fifty (50) feet above grade. Not to exceed three (3) such signs shall be permitted for each frontage on which area calculations are based, but one (1) of these may be mounted on a side wall.

2. Window signs, with same limitations as C-1, except they shall be onsite signs and shall be nonilluminated.

3. Projecting signs, with same limitations as C-1, except they shall be limited to onsite signs.

4. Marquee signs, with same limitations as C-1, except they shall be onsite signs.

5. Ground or freestanding signs, onsite, shall be limited to one (1) sign and forty (40) square feet of sign area (for each face) for each business, or for each fifty (50) feet of street frontage, whichever shall yield the largest area. Permitted sign area may be used in less than the maximum permitted number of such signs, but no sign shall exceed two hundred (200) square feet in area for each face. Maximum height limitation shall be twenty (20) feet including embellishments, measured from the crown of the nearest adjacent local or arterial street, not including limited access highways or expressways,

provided, however, that the zoning administrator, at his discretion, may increase the measurement of the crown by up to five (5) feet to accommodate unusual or undulating site conditions.

6. Directional signs, with same limitations as C-1, except they shall not exceed ten (10) square feet in surface area.

And in addition:

1. Wall signs, offsite, limited in location to side walls of buildings, limited in area as for wall signs, onsite, above, and to be included as part of total permitted wall sign area rather than in addition to onsite wall signs, and limited to one (1) sign on any premises. No offsite wall sign shall be permitted on the same wall with an onsite wall sign. (See sections 926.10 through 926.15 also.)

2. Ground or freestanding signs, offsite, shall be limited to two (2) for any lot, whether or not occupied by a building. The area shall not exceed seven hundred fifty (750) square feet for each surface, including embellishments. The total height shall not exceed thirty (30) feet, except as set forth in section 926.15.2, including embellishments, measured from the crown of the nearest adjacent local or arterial street, not including limited access highways or expressways; provided, however, that the zoning administrator, at his discretion, may increase the measurement of the crown by up to five (5) feet to accommodate unusual or undulating site conditions. (See sections 926.3, 926.10 through 926.15 also.)

3. Signs, onsite, above a height of fifty (50) feet above grade, shall be subject to the requirements and limitations of section 926.16.

CBD Central Business District Commercial.

* * *

Sign Regulations:

As permitted below:

Onsite signs only shall be permitted in these districts, subject to the following requirements and limitations. Except as otherwise provided, such signs may be illuminated but shall not be animated or flashing. At retail or service establishments, in addition to identifying the principal business, commodity or service, such signs may devote not more than half of their actual aggregate to the advertising of subsidiary products sold or services rendered on the premises.

1. Community or neighborhood bulletin boards or kiosks shall be permissible as provided at section 925.3.10.

2. Construction signs; not be exceed one (1) construction sign or thirty (30) square feet in area, for each lot line adjacent to a street.

3. Development signs except where combined with construction signs, shall be permissible only by Class I Special Permit as provided at section 925.3.8.

4. Directional signs, which may be combined with address signs but shall bear no advertising matter, may be erected to guide to entrances, exits, or parking areas, but shall not exceed five (5) square feet in surface area.

5. Ground or freestanding signs, limited to one (1) sign structure with not to exceed two (2) sign surfaces per parallel street frontage, neither of which shall exceed forty (40) square feet in sign area, for each establishment or for each fifty (50) feet of street frontage. Permitted sign area shall be cumulative, but no sign surface shall exceed eighty (80) square feet. Maximum height limitation shall be twenty (20) feet including embellishments, measured from the crown of the nearest adjacent local or arterial street, not including limited access highways or expressways, provided, however, that the zoning administer at his/her discretion may increase the measurement of the crown by up to five (5) feet to accommodate unusual or undulating site conditions.

6. Marquee, awning and canopy signs, limited to one (1) per establishment and three (3) square feet in area.

7. Projecting signs (other than marquee signs) shall be limited to one (1) sign structure with not to exceed two (2) sign surfaces, neither of which shall exceed twenty-five (25) square feet in sign area.

8. Real estate signs, limited to one (1) per street frontage and not to exceed half the area permissible for the same type of permanent sign on the premises.

9. Temporary civic and political campaign signs are allowed, subject to the exceptions, limitations and responsibilities of subsections 925.3.11, 925.3.12 and 925.3.13 respectively.

10. Wall signs, limited to two (2) square feet of sign area for each lineal foot of wall fronting on a street if any portion of such sign is below fifteen (15) feet above grade. For each foot that the lowest portion

of such sign exceeds fifteen (15) feet, permitted sign area shall be increased one (1) percent. Not more than three (3) such signs shall be permitted for each frontage on which area calculations are based, but one (1) of these may be mounted on a side wall.

I Industrial.

* * *

Sign Regulations:

Same as for C-2.

RT Fixed-Guideway Rapid Transit System Development District.

DIVISION 6. COMMERCIAL SIGNS ON RAPID TRANSIT SYSTEM RIGHT-OF-WAY

Sec. 33-121.20. Definitions

(a) *Rapid transit system right-of-way* shall mean an official map designating outside boundaries for the fixed-guideway rapid transit system for Dade County, Florida, which may from time to time be amended. The rapid transit system right-of-way map shall be so designated and recorded and on file in the public records of Dade County, Florida.

(b) *Applicable regulations* shall mean any pertinent zoning, building or other regulations in effect in the incorporated or unincorporated areas of Dade County or the State of Florida.

(c) *Protected areas* shall mean all property in Dade County within three hundred (300) feet of the right-of-way of any rapid transit system right-of-way.

(d) *Sign* shall mean any display of characters, letters, illustrations or any ornamentation designed or used as an advertisement, announcement or to indicate direction.

(e) *Erect* shall mean to construct, build, rebuild (if more than fifty (50) percent of the structural members involved), relocate, raise, assemble, place, affix, attach, paint, draw, or in any other manner bring into being or establish.

(f) *Temporary sign* shall mean signs to be erected on a temporary basis, such as signs advertising the sale or rental of the premises on which located; signs advertising a subdivision of property; signs advertising construction actually being done on premises on which the sign is located; signs advertising future construction to be done on the premises on which located and special events, such as public meetings, sporting events, political campaigns or events of a similar nature.

(g) *Point-of-sale* shall mean any sign advertising or designating the use, occupant of the premises, or merchandise or products sold on the premises.

(h) *Outdoor advertising sign* shall mean any sign which is used for any purpose other than that of advertising to the public the legal or exact firm name or type of business conducted on the premises, or of products or merchandise sold on the premises; or which is designed and displayed to offer for sale or rent the premises on which displayed, or the subdivision of such premises, or present or future construction or development of such premises, or

advertising special events, and which shall constitute an outdoor advertising sign. Outdoor advertising sign shall not include a sign which is erected inside a building for the purpose of serving the persons within the building.

Sec. 33-121.21. Applicability.

This division shall apply to both the incorporated and unincorporated area. Any municipality may establish and enforce equivalent or more restrictive regulations, as such municipality may deem necessary.

Sec. 33-121.22. Signs prohibited in protected areas.

It shall be unlawful hereafter for any person, firm or corporation, or any other legal entity, to erect, permit or maintain any sign in protected areas, except as provided for hereinafter.

Sec. 33-121.23. Exceptions to sign prohibition.

Erection of the following signs shall be permitted in protected areas, subject to the conditions and limitations listed herein and further subject to other applicable regulations where such regulations are more restrictive or more definitive than the provisions of this division and are not inconsistent therewith:

(a) Temporary signs which are located and oriented to serve streets other than a rapid transit system, and are located at least one hundred (100) feet from the rapid transit system right-of-way, except that such signs may serve and be oriented to a rapid transit system if the property concerned

abuts the rapid transit system right-of-way and is not served by a parallel rapid transit system service road or is abutting the rapid transit system right-of-way and has direct, permanent legal access to the rapid transit system. In no event shall any temporary sign be larger than one hundred twenty (120) square feet.

(b) Point-of-sale signs which are located on and oriented to the frontage on the street which provides actual and direct access to the front or principal entrance of the place of business; however, on corner lots a second detached point-of-sale sign will be permitted provided that the same is not larger than forty (40) square feet, is located on and oriented to the street frontage of the street other than the one serving the principal entrance of the place of business. "Oriented," in connection with point-of-sale signs, shall mean, in the case of detached signs, placed at a ninety-degree angle to the street being served; in the case of roof signs, parallel to and fronting such street and within the front twenty-five (25) percent of the building concerned; and in the case of pylon signs, within the front twenty (20) percent of the building concerned. Wall signs within two hundred (200) feet of a rapid transit system shall be confined to the wall of the building containing the principal entrance, except that a wall sign may be placed on one other wall of such building and shall be limited to ten (10) percent of such other wall area. In no event shall any detached point-of-sale roof sign be erected which is greater in height above the roof than ten (10) feet.

(c) Outdoor advertising signs shall not be erected for the purpose of serving any rapid transit system, and outdoor advertising signs in protected areas shall be erected and oriented to serve any streets

other than rapid transit systems, subject to the following conditions:

(1) That in no event shall any outdoor advertising sign be erected or placed closer than three hundred (300) feet to the right-of-way lines of any rapid transit system.

(2) That outdoor advertising signs shall be erected and placed only in business and commercial (not including industrial) zoning districts which permit outdoor advertising under the applicable zoning regulations of the county or municipality having jurisdiction.

(3) That no outdoor advertising sign shall be erected that is larger than fifteen (15) feet in width and fifty (50) feet in length, whether single or multiple boards.

(4) That no detached outdoor advertising sign shall be erected which is more than twenty-five (25) feet above the average existing grade of the site on which such sign is erected or the flood criteria elevation (if property is filled to such elevation), whichever is the greater; nor shall an outdoor advertising roof sign be erected which is more than twenty (20) feet above the roof.

(5) That no advertising signs shall be erected or placed within three hundred (300) feet of another outdoor advertising sign, such distance to be measured in all directions from the outermost edges of such sign.

(6) That no outdoor advertising sign shall be erected or placed within one hundred (100) feet of any church, school, cemetery, public park, public reservation, public playground, state or national forest.

(7) That outdoor advertising signs shall be erected and placed at right angles to the street which they are serving and shall be located within the front seventy (70) feet of the lot or tract on which erected.

(8) That no outdoor advertising signs shall be erected or placed on a street dead-ended by the rapid transit system, between the rapid transit system and the first street running parallel to the rapid transit system and on the same side of the dead-end street, even though such distance may be greater than three hundred (300) feet.

(9) That outdoor advertising signs shall be erected and placed only on property conforming in size and frontage to the requirements of the zoning district in which it is located, and detached outdoor advertising signs shall not be erected on property already containing a use or structure.

(10) That detached outdoor advertising sign structures shall be of the so-called cantilever-type construction (double-faced sign, both faces of the same size, secured back to back on vertical supports with no supporting bracing).

(d) Any sign which fails to conform with the provisions of this division but is not visible from any rapid transit system due to an intervening obstruction.

Sec. 33-121.24. Non conforming signs.

(a) Signs which have been erected prior to the effective date of this division may continue to be maintained until

January 1, 1984. Thereafter, unless such signs conform to the provisions of this division, they shall be removed. If a nonconforming spacing situation can be eliminated by the removal of one (1) sign, the sign which has been erected for the longest period of time shall have priority.

(b) [If] any sign [be] legally erected, permitted or maintained subsequent to the effective date of this division, which is not in violation of this division but upon the opening for public use of a rapid transit system or applicable portion thereof becomes nonconforming, the same may continue to be maintained for a period of three (3) years from the day of such opening, provided on or before the expiration of the three-year period, the nonconforming sign must be removed; provided any sign which is exempt from the provisions of this division pursuant to (d) of section 33-121.23 hereof, but subsequently becomes nonconforming due to the elimination of the obstruction preventing its visibility from a rapid transit system, must be removed within three (3) years from the time of the elimination of such obstruction; further provided, after the effective date of this amendment any sign erected, permitted or maintained after a future rapid transit system right-of-way has been designated by the recording of a rapid transit system right-of-way map in the public records of Dade County, Florida, which becomes nonconforming due to the completion of such rapid transit system shall be removed within thirty (30) days after such rapid transit system or applicable portion thereof is opened for public use.

Sec. 507. Signs visible from outside PUD in residential districts.

A maximum of two (2) identification signs may be erected within such districts with total combined maximum

surface area of fifty (50) square feet, at each principal entrance. In addition, during the process of construction and initial sale or rental within such development, temporary announcement signs may be allowed by Class I-Special Permit only, for periods not exceeding one (1) year, and renewable for one-year terms for not to exceed two (2) additional years.

Such temporary signs shall not exceed two (2) with combined maximum surface area of forty (40) square feet for each principal entrance. Such signs shall be located at least ten (10) feet in from any property line, and oriented for minimum adverse effects on adjoining or facing residential property. Location shall be further governed by requirements for vision clearance at intersections as set out at section 908.11.

507.1. Signs limitations at PD mixed-use districts. Limitations on signs shall be as for C-1 Restricted Commercial Districts except as provided below:

1. In addition to signs permitted or conditional under C-1 regulations, one (1) sign structure, not exceeding thirty-five (35) feet in height, and having not more than two (2) sign surfaces, may be erected along each principal street frontage from which there is a major entrance, to identify the development as a whole. Such signs may indicate the establishments, activities, and facilities within the development, but shall not include other advertising. Each such sign surface may have a minimum area of forty (40) square feet, plus one (1) square foot for each two and one-half (2½) feet by which the frontage involved exceeds

one hundred (100) feet, up to a maximum of one hundred (100) square feet per surface.

(Ord. No. 10771, § 1, 7-26-90; Ord. No. 10863, § 1, 3-28-91)

Sec. 601.3. Class II Special Permit.

601.3.2. Considerations in making Class II Special Permit determinations.

The purpose of the Class II Special Permit shall be to ensure conformity of the application with the expressed intent of this district, with the general considerations listed in section 1305, and with the special considerations listed below.

1. All signs, awnings and storefront renovations shall be of a style and/or size which is consistent with the existing or adjacent building styles and/or storefront designs.

2. Wherever feasible, lot frontage along Martin Luther King Boulevard and N.W. 7th Avenue should be developed in accord with design standards and guidelines in the "City of Miami Primary Pedestrian Pathway Design Guides and Standards."

(Ord. No. 10771, § 1, 7-26-90; Ord. No. 10863, § 1, 3-28-91)

Sec. 602. SD-2 Coconut Grove Central Commercial District.

Sec. 602.11. Limitations on signs.

No signs intended to be read from off the premises shall be erected except as provided below:

602.11.1. General limitations.

602.11.1.1. Prohibited signs. Billboards, poster panels, ground or freestanding signs and other outdoor advertising signs shall be prohibited in this district. Other offsite signs shall be prohibited except for temporary civic and political campaign signs or except when signs are posted on community or neighborhood bulletin boards or kiosks, in accordance with limitations and regulations relating thereto at section 925.310 and those applied in special permit proceedings on particular community or neighborhood bulletin boards or kiosks.

602.11.1.2. Signs more than fifteen feet above grade, limitations on number, area, subject matter. Signs erected with their lowest portions more than fifteen (15) feet above grade shall be limited to those identifying the building and the nature of the establishments it contains. Only one (1) such sign, not exceeding fifty (50) square feet in area, for every one hundred fifty (150) feet of length of building wall shall be permitted for each face of the building oriented toward the street.

602.11.1.3. Signs fifteen feet or less above grade, limitations on number and area. Wall signs (not including signs in glassed areas of windows or doors) and projecting signs erected with their highest portion fifteen (15) feet or less above grade shall be limited in total area to twenty (20) square feet, except as otherwise specifically provided herein. Signs in the glassed areas of windows and doors shall not exceed twenty (20) percent of the glassed area of the window or door involved. One (1) ground sign, limited to ten (10) square feet in area, may be erected for buildings on lots where the street yard exceeds twenty (20) feet in depth.

602.11.2. Detailed limitations, wall signs, projecting signs, marquee signs, window signs.

Within the twenty (20) square feet maximum allowable at or below fifteen (15) feet above grade, the following limitations shall apply to number and area of signs. Not more than one (1) wall sign may be erected per establishment, and maximum area of any such sign shall be twenty (20) square feet. Not more than one (1) projecting sign, other than a marquee sign, shall be erected, with not to exceed two (2) sign surfaces, neither of which shall exceed ten (10) square feet in area. No such sign structure shall extend more than three (3) feet from the wall of the building. Marquee signs shall be limited to one (1) per establishment and three (3) square feet in sign area.

602.11.3. Real estate signs, construction signs, development signs, number and area.

Real estate, construction or development signs, individually or in combination, shall be limited to one (1) per street frontage, not exceeding ten (10) square feet in area, and erected with the highest portion fifteen (15) feet or less above grade. Real estate signs which are not part of construction or development signs shall not require a special permit.

602.11.4. Directional signs, number and area.

Directional signs, which may be combined with address signs but shall bear no advertising matter, may be erected to guide to entrances, exits, or parking areas. Not more than one (1) such sign, not exceeding five (5) square feet in area, shall be erected per entrance, exit, or parking area.

Notwithstanding the provisions set forth in section 602.11.1.1, where there are commercial, service or retail uses in a structure which may not be seen directly from the public right-of-way, but have direct access from a courtyard or open space which abuts a primary pedestrian pathway, a free-standing directional sign containing the names of all the establishments concealed from direct view may be erected which may be combined with a location map of the complex. Not more than one (1) such sign, not exceeding twenty (20) square feet in area, shall be erected per entrance, exit, or parking area.

602.11.5. Community or neighborhood bulletin boards or kiosks, area and location.

Area and location of community or neighborhood bulletin boards or kiosks shall be determined at the time of special permit proceeding.

602.11.6. Additional wall signs for theaters, museums, noncommercial art galleries.

In addition to signs permitted above, theaters, museums, noncommercial art galleries and the like may have wall sign areas for display of announcements concerning coming or current exhibits or performances. Area of such display surfaces shall not exceed two (2) square feet for each lineal foot of building wall frontage on a street, with maximum permitted area two hundred (200) square feet.

602.11.7. Special permit requirements, specified types of signs.

Except where such signs are approved in connection with general special permit actions concerning development on the premises, a Class II Special Permit shall be required for the following signs: Permanent window or door signs,

projecting signs, marquee signs, development signs, construction signs, directional signs, community or neighborhood bulletin boards or kiosks, and wall sign display areas for theaters, museums, noncommercial art galleries and the like.

(Ord. No. 10771, § 1, 7-26-90; Ord. No. 10863, § 1, 3-28-91; Ord. No. 11569, § 2, 10-28-97)

Sec. 604. SD-4 Waterfront Industrial District.

Sec. 604.11. Limitations on signs.

Sign limitations shall be as provided for C-1 districts.

(Ord. No. 10863, § 1, 3-28-91)

Sec. 605. SD-5 Brickell Avenue Area Office-Residential District.

Sec. 605.11. Limitations on signs.

Sign limitations shall be as provided for C-1 districts.

(Ord. No. 10863, § 1, 3-28-91)

Sec. 606. SD-6, SD-6.1 Central Commercial Residential Districts.

Sec. 606.11. Limitations on signs.

Sign limitations shall be as provided for the C-1 district with the following exceptions and modifications:

1. Signs, flashing, animated, revolving, whirling, banners, pennants or streamers shall be permitted.

2. Offsite signs shall be permitted, subject to the following conditions: Maximum one (1) per street frontage, maximum four hundred (400) square feet of surface area per sign and all such offsite signs shall be designed to exhibit continuously changing displays of figures, words or graphics through the use of lights, projected images or luminous character generators. Temporary civic and political campaign signs limited to four hundred (400) square feet of surface area are allowed. Offsite signs above a height of fifty (50) feet above grade shall be subject to the provisions of section 926.16, as appropriate and where those provisions are more limiting.

3. Projecting signs (other than marquee signs) shall be limited to one hundred twenty (120) square feet for each sign surface.

4. Ground or freestanding signs shall be limited to directional signs and temporary civic and political campaign signs.

5. Kiosk advertising shall be limited to the announcement of events, exhibits, entertainment, and cultural events.

(Ord. No. 10863, § 1, 3-28-91)

Sec. 607. SD-7 Central Brickell Rapid Transit Commercial-Residential District.

Sec. 607.11. Limitations on signs.

Sign limitations shall be as provided in section 602.11, recognizing the size limitations thereof, provided further

that onsite signs above a height of fifty (50) feet above grade shall be subject to the provisions of section 926.16.

(Ord. No. 10863, § 1, 3-28-91)

Sec. 608. SD-8 Design Plaza Commercial-Residential District.

Sec. 608.11. Limitations on signs.

Limitations on signs shall be as for C-1 districts.

(Ord. No. 10863, § 1, 3-28-91)

Sec. 609. SD-9 Biscayne Boulevard North Overlay District.

Sec. 609.8. Limitations on signs.

Sign limitations shall be as for C-1 districts, except for properties which have direct frontage along Biscayne Boulevard or which have frontage within one hundred (100) feet of Biscayne Boulevard, in which case sign limitations shall be as provided below:

609.8.1. General limitations.

609.8.1.1. Signs more than fifteen (15) feet above grade.

a) Signs more than fifteen (15) feet above grade, but less than fifty (50) feet above grade. Signs erected with their lowest portions more than fifteen (15) feet above grade shall be limited to those identifying the building and the nature of the establishments it contains. Except as provided below, only one (1) such sign, not exceeding fifty (50) square feet in

area for every one hundred fifty (150) feet of length of building wall oriented toward the street, shall be permitted. In addition to the Class II Special Permit required for such signs, referral to the urban development review board shall be mandatory for signs fifteen (15) feet above grade that exceed the allowable fifty (50) square feet of sign area. Area of such signs shall in no case exceed 1.5 square feet for each lineal foot of building wall frontage on a street.

b) Signs more than fifty (50) feet above grade. Signs erected with their lowest portions more than fifty (50) feet above grade shall be regulated generally by the limitations of section 926.16 of this zoning ordinance (including the criteria stated therein) except for the limitations on the sizes of the letters which shall be as follows:

1. Letters of signs on buildings with a height of one hundred (100) feet or more shall be permitted up to a height of eight (8) feet; and

2. Letters of signs on buildings with a height of one hundred fifty (150) feet or more shall be permitted up to a height of ten (10) feet.

In addition to the Class II Special Permit required for such signs, referral to the urban development review board shall be mandatory.

609.8.1.2. Signs fifteen (15) feet or less above grade; limitations on number and area. Wall signs (not including signs in glassed areas of windows or doors) and projecting signs erected with their highest portion fifteen (15) feet or less above grade shall be

limited in total area to twenty (20) square feet, except as otherwise specifically provided herein (see section 609.8.2). Signs in glassed areas of windows and doors shall not exceed twenty (20) percent of the glassed area of the window or door involved.

609.8.1.3. Prohibited signs. Billboards, poster panels, balloon signs, ground or freestanding signs and other outdoor advertising signs shall be prohibited in this district. Other offsite signs shall be prohibited except for temporary civic and political campaign signs or except when signs are posted on community or neighborhood bulletin boards or kiosks, in accordance with limitations and regulations relating thereto at section 925.3.10 and those in special permits proceedings on particular community or neighborhood bulletin boards or kiosks.

609.8.2. Detailed limitations, wall signs, projecting signs, window signs.

609.8.2.1. Within twenty (20) square feet maximum allowable, at or below fifteen (15) feet above grade, the following limitations shall apply to number and area of signs. Not more than one (1) wall sign may be erected per establishment unless the establishment has frontage along two (2) streets, in which case two (2) wall signs shall be permitted, one (1) on each wall fronting a street, and the maximum area of any such sign shall be twenty (20) square feet. Not more than one (1) projecting sign, other than a marquee sign, shall be erected, with not to exceed two (2) surfaces, neither of which shall exceed twenty-five (25) square feet in area. No such sign structure shall extend more than three (3) feet from the wall of the building. Marquee signs shall be limited to one (1) per establishment and three (3) square feet in sign area.

609.8.3. Directional signs, number and area.

Directional signs, which may be combined with address signs, but shall bear no advertising manner [matter], may be erected to guide entrances, exits or parking areas. Not more than one (1) such sign, not exceeding five (5) square feet in area, shall be erected per entrance, exit or parking area.

(Ord. No. 11022, § 1, 11-12-92; Ord. No. 11258, § 1, 5-1-95; Ord. No. 11315, § 1, 9-28-95; Ord. No. 11862, § 2, 11-19-99)

Sec. 611. SD-11 Coconut Grove Rapid Transit District.

Sec. 611.11. Limitations on signs.

Sign limitations shall be as for the C-1 district.

(Ord. No. 10863, § 1, 3-28-91)

Sec. 613. SD-13 S.W. 27th Avenue Gateway District.

Sec. 613.11. Limitations on signs.

Limitations on signs shall be as required for SD-2 district.

(Ord. No. 10771, § 1, 7-26-90; Ord. No. 10863, § 1, 3-28-91)

Sec. 614.3. Commercial-residential district (SD-14).

614.3.8. Limitations on signs.

No sign to be read from off the premises shall be erected except as provided below:

614.3.8.1. General limitations.

614.3.8.1.1. Prohibited signs. Billboards, poster panels, ground or freestanding signs and other outdoor advertising signs shall be prohibited in this district. Other offsite signs shall be prohibited except for temporary civic and political campaign signs or except when signs are posted on community or neighborhood bulletin boards or kiosks, in accordance with limitations and regulations relating thereto at section 925.3.10 and those applied in special permit proceedings on particular community or neighborhood bulletin boards or kiosks.

614.3.8.1.2. Signs more than fifteen feet above grade, limitations on number, area, subject matter. Signs erected with their lowest portions more than fifteen (15) feet above grade shall be limited to those identifying the building and the nature of the establishments it contains. The size of signs shall not be greater than one and one quarter (1.25) square feet per linear foot of wall frontage or a maximum of sixty (60) square feet for every one hundred and fifty (150) feet of length of building wall for each face of the building oriented toward the street. The maximum length of signs shall not exceed sixty (60) percent of the linear street frontage occupied by a licensed establishment. The size of letters shall not exceed eighteen (18) inches in height.

614.3.8.1.3. Signs fifteen feet or less above grade, limitations on number and area. Wall signs (not including signs in glassed areas of windows or doors) and projecting signs erected with their highest portion fifteen (15) feet or less above grade shall be the same as section

[sic]. Signs in the glassed areas of windows and doors shall not exceed twenty (20) percent of the glassed area of the window or door involved. One (1) ground sign, limited to ten (10) square feet in area, may be erected for buildings on lots where the street yard exceeds twenty (20) feet in depth.

614.3.8.2. Detailed limitations, wall signs, projecting signs, marquee signs, window signs. Within the twenty (20) square feet maximum allowable at or below fifteen (15) feet above grade, the following limitations shall apply to number and area of signs. Not more than one (1) wall sign may be erected per establishment and maximum area of any such sign shall be twenty (20) square feet. Not more than one (1) projecting sign, other than a marquee sign, shall be erected, with not to exceed two (2) sign surfaces, neither of which shall exceed ten (10) square feet in area. No such sign structure shall extend more than three (3) feet from the wall of the building. Marquee signs shall be limited to one (1) per establishment and three (3) square feet in sign area.

614.3.8.3. Real estate signs, construction signs, development signs, number and area. Real estate, construction or development signs, individually or in combination, shall be limited to one (1) per street frontage, not exceeding ten (10) square feet in area, and erected with the highest portion fifteen (15) feet or less above grade. Real estate signs which are not part of construction or development signs shall not require a special permit.

614.3.8.4. Directional signs, number and area. Directional signs, which may be combined

with address signs but shall bear no advertising matter, may be erected to guide to entrances, exits or parking areas. Not more than one (1) such sign, not exceeding five (5) square feet in area, shall be erected per entrance, exit, or parking area.

614.3.8.5. Community or neighborhood bulletin boards or kiosks, area and location. Area and location of community or neighborhood bulletin boards or kiosks shall be determined at the time of special permit processing.

614.3.8.6. Additional wall signs for theaters, museums, noncommercial art galleries. In addition to signs permitted above, theaters, museums, noncommercial art galleries and the like may have wall sign areas for display of announcements concerning coming or current exhibits or performances. Area of such display surfaces shall not exceed two (2) square feet for each lineal foot of building wall frontage on a street, with maximum permitted area two hundred (200) square feet. For additional information on signs, see "Latin Quarter Design Guidelines and Standards."

614.3.8.7. Special permit requirements, specified types of signs. Except where such signs are approved in connection with general special permit actions concerning development on the premises, a Class II permit shall be required for the following signs: Permanent window or door signs, projecting signs, marquee signs, development signs, construction signs, directional signs, community or neighborhood bulletin boards or kiosks, and wall sign display areas for theaters, museums, noncommercial art galleries and the like.

614.3.8.8. Ground or freestanding signs to be allowed for gasoline stations only by Special Exception. Such signs shall be limited to one (1) sign structure with not to exceed two (2) sign surfaces, neither of which shall exceed forty (40) square feet in sign area, for each establishment. Maximum height to top of sign not to exceed twenty-six (26) feet. Design of sign shall comply with "The Latin Quarter Design Guides and Standards."

(Ord. No. 10771, § 1, 7-26-90; Ord. No. 10863, § 1, 3-28-91; Ord. No. 10977, § 1, 4-30-92; Ord. No. 11011, § 1, 10-22-92; Ord. No. 11054, § 1, 3-25-93; Ord. No. 11056, § 1, 3-25-93; Ord. No. 11106, § 3, 11-23-93; Ord. No. 11178, § 1, 9-22-94; Ord. No. 11628, § 2, 3-24-98)

Sec. 615. SD-15 River Quadrant Mixed-Use District.

Sec. 615.8. Sign regulations.

Onsite signs only shall be permitted in this district, subject to the following requirements and limitations. Except as otherwise provided, such signs may be illuminated but shall not be animated or flashing. At retail or service establishments, in addition to identifying the principal business, commodity or service, such signs shall not devote more than half of their actual aggregate to the advertising of subsidiary products sold or services rendered on the premises.

Construction signs; not to exceed one (1) construction sign or thirty (30) square feet in area, for each lot line adjacent to a street.

Development signs, except where combined with construction signs, shall be permissible only by Class I Special Permit as provided in section 925.3.8.

Directional signs, which may be combined with address signs but shall bear no advertising matter, may be erected to guide to entrances, exits or parking areas, but shall not exceed five (5) square feet in surface area.

Ground or monument signs, limited to one (1) sign structure with not to exceed two (2) signs surfaces, neither of which shall exceed forty (40) square feet in sign area, for each establishment or for each fifty feet of street frontage. Permitted sign area shall be cumulative, but no sign surface shall exceed one hundred (100) square feet. Maximum height limitation shall be twenty (20) feet including embellishments, measured from the crown of the nearest adjacent local or arterial street, not including limited access highways or expressways, provided however, that the zoning administrator may increase the measurement of the crown up to five (5) feet to accommodate unusual or undulating site conditions.

Projecting signs shall be limited to one (1) sign structure with not to exceed two (2) sign surfaces, neither of which shall exceed forty (40) square feet in sign area; provided however that such permissible sign area shall be increased to eighty (80) square feet where maximum projection from the face of the building is two (2) feet or less, sixty (60) square feet where the projection is more than two (2) and less than three (3) feet, and forty (40) square feet where the projection is at least three (3), but not more than four (4) feet.

Real estate signs, limited to one (1) per street frontage and not to exceed half the area permissible for the same type of permanent sign on the premises.

Temporary civic and political campaign signs are allowed, subject to the exceptions limitations and responsibilities of subsections 925.3.11, 925.3.12 and 925.3.13, herein, respectively.

Wall signs, limited to two and one-half (2½) square feet of sign area for each lineal foot of wall fronting on a street if any portion of such sign is below fifteen (15) [sic] above grade. For each foot that the lowest portion of such sign exceeds fifteen (15) feet, permitted sign area shall be increased one (1) percent. Not more than three (3) such signs shall be permitted for each frontage on which area calculations are based, but one (1) of these signs may be mounted on a side wall.

Window signs, painted or attached, shall not exceed twenty (20) percent of the glassed area of the window in which they are placed.

(Ord. No. 10863, § 1, 3-28-91; Ord. No. 11375, § 2, 6-27-96)

Sec. 616. SD-16, 16.1, 16.2 Southeast Overtown-Park West Commercial-Residential Districts.

Sec. 616.11. Limitations on signs.

Sign limitations shall be as set forth in section 602.11, except in SD-16 and 16.1, animated and flashing signs and banners shall be permitted for ground level nonresidential uses fronting on N.E. and N.W. 9 Street. Onsite signs above a height of fifty (50) feet above grade shall be subject to the provisions of section 926.16. Offsite signs are prohibited.

(Ord. No. 10863, § 1, 3-28-91

Sec. 620. SD-20 Edgewater Overlay District.

(Ord. No. 10801, § 1, 10-18-90)

Sec. 620.8. Limitations on signs.

Sign limitations shall be as for C-1 districts, except as provided below:

620.8.1. General limitations.

620.8.1.1. Signs more than fifteen (15) feet above grade.

1. Signs more than fifteen (15) feet above grade, but less than fifty (50) feet above grade. Signs erected with their lowest portions more than fifteen (15) feet above grade shall be limited to those identifying the building and the nature of the establishments it contains. Except as provided below, only one (1) such sign, not exceeding fifty (50) square feet in area for every one hundred fifty (150) feet of length of building wall oriented toward the street, shall be permitted. In addition to the Class II Special Permit required for such signs, referral to the urban development review board shall be mandatory for signs fifteen (15) feet above grade that exceed the allowable fifty (50) square feet of sign area. Area of such signs shall in no case exceed 1.5 square feet for each lineal foot of building wall frontage on a street.

2. Signs more than fifty (50) feet above grade. Signs erected with their lowest portions more than fifty (50) feet above grade shall be regulated generally by the limitations of section 926.16 of this zoning ordinance (including the criteria stated therein)

except for the limitations on the sizes of the letters which shall be as follows:

(a) Letters of signs on buildings with a height of one hundred (100) feet or more shall be permitted up to a height of eight (8) feet; and

(b) Letters of signs on buildings with a height of one hundred fifty (150) feet or more shall be permitted up to a height of ten (10) feet.

In addition to the Class II Special Permit required for such signs, referral to the urban development review board shall be mandatory.

620.8.1.2. Signs fifteen (15) feet or less above grade; limitations on number and area. Wall signs (not including signs in glassed areas of windows or doors) and projecting signs erected with their highest portion fifteen (15) feet or less above grade shall be limited in total area to twenty (20) square feet, except as otherwise specifically provided herein (see section 609.8.2). Signs in glassed areas of windows and doors shall not exceed twenty (20) percent of the glassed area of the window or door involved.

620.8.1.3. Prohibited signs. Billboards, poster panels, balloon signs, ground or free-standing signs and other outdoor advertising signs shall be prohibited in this district. Other offsite signs shall be prohibited except for temporary civic and political campaign signs or except when signs are posted on community or neighborhood bulletin boards or kiosks, in accordance with limitations and regulations relating thereto at section 925.3.10 and those in special permits proceedings

on particular community or neighborhood bulletin boards or kiosks.

620.8.2. Detailed limitations, wall signs, projecting signs, window signs.

620.8.2.1. Within twenty (20) square feet maximum allowable, at or below fifteen (15) feet above grade, the following limitations shall apply to number and area of signs. Not more than one (1) wall sign may be erected per establishment unless the establishment has frontage along two (2) streets, in which case two (2) wall signs shall be permitted, one (1) on each wall fronting a street, and the maximum area of any such sign shall be twenty (20) square feet. Not more than one (1) projecting sign, other than a marquee sign, shall be erected, with not to exceed two (2) surfaces, neither of which shall exceed twenty-five (25) square feet in area. No such sign structure shall extend more than three (3) feet from the wall of the building. Marquee signs shall be limited to one (1) per establishment and three (3) square feet in sign area.

620.8.3. Directional signs, number and area.

Directional signs, which may be combined with address signs, but shall bear no advertising, may be erected to indicate entrances, exits or parking areas. Not more than one (1) such sign, not exceeding five (5) square feet in area, shall be erected per entrance, exit or parking area.

(Ord. No. 11953, § 2, 7-27-00)

Sec. 622. SD-22 Florida Avenue Special District.

Sec. 622.11. Limitations on signs.

(1) Address signs shall not exceed one (1) for each dwelling unit and each sign shall not exceed three (3) square feet in surface area.

(2) Total signage is limited to ten (10) square feet per building. Signs must be front lit only and no illumination of signs shall cause spill-over onto adjacent properties.

(3) No signage shall be placed above the first floor level.

(Ord. 11243, § 2, 3-27-95)

Sec. 908. Lot measurement.

908.7. Signs in or over required yards.

Signs may be erected in or may overhang required yards to the extent permitted in district regulations, but shall not be so constructed or located as to interfere with visibility triangle requirements or create traffic hazards. (See section 908.11 for visibility triangle requirements.)

Sec. 925. Signs, generally.

The following requirements and limitations shall apply with regard to signs, in addition to provisions appearing elsewhere in the text of these regulations or in the schedule of district regulations. No variance from these provisions is permitted.

925.1. Reserved.

925.2. Permits required for signs except those exempted, applications.

Except for classes of signs exempted from permit requirements of section 925.3, all signs shall require permits. Applications for such permits shall be made separately or in combination with applications for other permits, as appropriate to the circumstances of the case, on forms provided by the administrative official, and shall be accompanied by such information as is reasonably required to make necessary determinations in the case.

925.2.1. Permit identification required to be on sign. Any sign requiring a permit or permits shall be clearly marked with the permit number or numbers and the name of the person or firm placing the sign on the premises.

925.3. Classes of signs and activities in relation to signs exempted from permit requirements; other limitations, regulations, and requirements remain applicable.

The following classes of signs or activities in connection with signs are exempted from permit requirements, but other limitations, regulations, and requirements concerning such signs or activities remain applicable except as otherwise provided:

925.3.1. Signs erected by or on order of governmental jurisdictions. Sign permits are not required for official signs erected by or on order of governmental jurisdictions, notwithstanding any limitations set out in these regulations.

925.3.2. National flags and flags of political subdivisions. Sign permits are not required for display of national flags or flags of political subdivisions.

925.3.3. Decorative flags, bunting, and other decorations on special occasions. No sign permit shall be required for display of decorative flags, bunting, and other decorations related to official holidays, or for celebrations, conventions, or commemorations when authorized by the city commission for a specified period of time.

925.3.4. Symbolic flags, award flags, house flags. No sign permit shall be required for display of symbolic, award, or house flags, limited in number to one (1) for each institution or establishment for the first fifty (50) feet or less of street frontage and one (1) for each fifty-foot increment of lot line adjacent to a street.

925.3.5. Address, notice, and directional signs, warning signs. No sign permit shall be required for address, notice, and directional signs or warning signs except as otherwise required in this ordinance.

925.3.6. Signs on vehicles exempted generally; permit required for sign vehicles. No sign permit shall be required for display of signs on automobiles, trucks, buses, trailers, or other vehicles when used for normal purposes of transportation. Signs displayed on sign vehicles shall require a sign permit, except for temporary political or civic campaign signs on vehicles.

925.3.7. Real estate signs. No sign permit shall be required for real estate signs, provided that the number and area of such signs shall not exceed maximums established for the district in which located, and district regulations shall be controlling as regards location on premises.

925.3.8. Construction signs; development signs when combined with construction signs: development signs, Class I Special Permit, when required. A sign permit shall be required for construction signs not exceeding two (2) feet in height and three (3) feet in width of sign surface area displayed during the course of actual construction work on the premises, limited to one (1) sign for each lot line adjacent to the street, or for combinations of construction and development signs so limited as to number and area, when displayed during such period. Development signs displayed prior to initiation of actual construction on the premises, or construction or development signs displayed following completion of actual construction, shall require a Class I Special Permit. Such Class I Special Permits shall be issued only after required development permits have been issued and shall specify that maximum time permissible between erection of the sign and beginning of construction, conditions under which the sign is to be removed if construction is not begun as specified or is not carried to completion diligently, and requirements for removal of limitations on continuation following construction.

Beyond these minimums, number and area of such signs shall not exceed maximums established for the district in which located and sign permits shall be required. District regulations shall be controlling as to location on premises, whether or not sign permits are required.

925.3.9. Balloon. Permitted only in conjunction with a special event by Class I Special Permit in conjunction with the event, and limited to a duration of no more than two (2) weeks (also see section 906.9 regarding limitations for special events).

Balloons suspended in air may not be elevated to a height greater than thirty-two (32) feet above the rooftop of the building in which the advertised use or occupant is located.

925.3.10. Community or neighborhood bulletin boards, kiosks; Class I Special Permit required for establishment, but not for posting signs. Class I Special Permits shall be required for establishment of community or neighborhood bulletin boards, including kiosks in districts where permissible, but no sign permits shall be required for posting of notices thereon.

Subject to approval by the officer or agent designated by the city manager, such signs may be erected on public property. Conditions of such Class I Special Permit shall include assignment of responsibility for erection and/or maintenance, and provision for removal if not properly maintained.

No such community or neighborhood bulletin board or kiosks shall be used in the conduct of the outdoor advertising business or for the display of outdoor advertising signs nor for the posting of general or continued advertising by commercial or service establishment.

925.3.11. Temporary civic campaign signs. No sign permit shall be required for temporary civic campaign signs displayed on private property, in nonresidential districts, not exceeding fifteen (15) square feet in sign surface area, and used in connection with civic noncommercial health, safety, or welfare campaigns, provided that all such signs shall exhibit the date of the conclusion of the campaign and shall be removed within three (3) days thereafter. Outdoor advertising

signs where otherwise permitted by terms of this ordinance are excluded from the terms of this subsection.

925.3.12. Temporary political campaign signs. No sign permit shall be required for temporary political campaign signs displayed on private property and used in connection with local, state and national political campaigns, subject to the following exceptions, limitations and responsibilities:

(a) Outdoor advertising signs, where otherwise permitted by terms of this ordinance, are excluded from this section.

(b) In residential zoning districts, the maximum size of such signs shall be limited to four (4) square feet per sign face; there shall be no more than two (2) sign faces per site.

(c) The maximum height of such signs shall be limited to four (4) feet from grade to the top of signs.

(d) Except for (a) above, the height and area of such signs shall be limited to the height and one-half (½) the area of offsite signs permitted.

(e) Vision clearance areas shall be maintained at street corners and driveways (see section 926.8).

(f) All signs must conform to the requirements of chapter 42 of the South Florida Building Code as may be amended, except for painted wall signs and paper signs in windows. Portable signs, except for sign vehicles, herein defined as "signs not secured to the ground in accordance with chapter 42 of the

South Florida Building Code, as may be amended," shall not be allowed.

(g) Sign vehicles with temporary political campaign signs may be parked on private property in commercial and industrial districts for a period not to exceed sixteen (16) hours per day. No such sign vehicle shall be parked on private property in residential districts. No sign vehicles shall be parked closer than ten (10) feet from the base building line. Signs on a sign vehicle shall not be illuminated.

(h) Signs shall not be installed in any zoning district until the subject candidate has qualified for a particular election; signs shall be removed within three (3) days after the conclusion of the particular election.

(i) A candidate and/or property owner and/or tenant are responsible for any hazard to the general public which is caused by, or created by reason of, the installation and/or maintenance of temporary political campaign signs and also are responsible for prompt removal of such signs (see (h) above).

925.3.13. Removal. Any political or civic sign not posted in accordance with the provisions of this article and any such sign which exists in violation of this article shall be deemed to be a public nuisance and shall be subject to removal by the candidate, property owner or, when a proposition is involved, the person advocating the vote described on the sign.

925.3.14. Cornerstones, memorials, or tablets. No sign permit is required for cornerstones, memorials, or tablets when part of any masonry surface or

constructed of bronze or other incombustible and durable material and used to indicate, without advertising matter, such information as identification and date of construction of buildings, persons present at dedication or involved in development or construction, or significant historical events relating to the premises or development.

925.3.15. Curbside delivery receptacles; general approval required; sign permit for individual delivery receptacles not required; limitations on location. No sign permit shall be required for erection of curbside delivery receptacles for U.S. mail which have been approved for use by postal authorities. Where curbside delivery receptacles are intended for general use for other purposes (as for example in the case of newspaper deliveries), a Class I Special Permit with mandatory referral to the public works department shall be required for general approval of the design of any such receptacles as are proposed for use in residential districts, and for the color and wording to be used thereon. Following general approval, based on findings that the design, color, and wording of the proposed receptacle are appropriate in residential environments, sign permits for erection of individual delivery receptacles of this kind are not required.

No such curbside delivery receptacle shall extend closer than sixteen (16) inches to the outer edge of the curb or, in the absence of the curb, to the right-of-way line of any street.

925.3.16. Signs on bus shelters, benches, trash receptacles, and the like. Where bus shelters, benches, trash receptacles, or other structures or devices for promotion of public comfort, convenience, or

health are erected or maintained by public agencies, signs authorized by such agencies shall not require permits. Where such structures or devices are to be privately erected or maintained in districts other than residential, signs thereon shall be subject to limitations and requirements applying generally within such districts. Where such structures or devices are to be privately erected or maintained in residential districts, a Class I Special Permit with mandatory referral to the public works department shall be required for approval of design thereof, and in connection with such permit, limitations and requirements shall be established as to character, size, number and method of display and maintenance of any signs, as appropriate to the residential environment.

As appropriate to the circumstances of the case, Class I Special Permits of this type may be made applicable to individual structures or devices of the character described, or to specified numbers and locations, or to general classes of structures or devices, proposed for erection or maintenance by applicants.

925.3.17. Weather flags. No sign permit shall be required for weather flags for official notice of weather conditions authorized or displayed by official government agencies, provided that not more than one (1) set of such flags shall be permitted on any premises, and that any display of weather signals shall be an accurate reflection of official weather reports.

925.3.18. Church signs. Freestanding church signs for name and schedule of services shall be permitted, provided that the maximum size of such sign shall be forty (40) square feet.

925.3.19. Freestanding perimeter wall signs. Freestanding perimeter wall signs identifying a development shall be permitted, provided that the maximum square footage of such sign shall not exceed two (2) feet in height and ten (10) feet in width of sign surface area and that such signs shall be limited to one (1) sign per wall facing.

925.20. Reserved.

925.3.21. Activities related to signs exempted from permit requirements. No sign permit shall be required for routine change of copy on a sign, the customary use of which involves frequent and periodic changes, or for the relocation of sign embellishments, providing such relocation does not result in increase of total area of the sign beyond permissible limits. Where change in copy changes the class of sign to a nonexempt category, however (as for example when advertising matter is added to a previously exempt address or directional sign), a sign permit shall be required.

(Ord. No. 10976, § 1, 4-20-92; Ord. No. 11079, § 3, 7-22-93)

Sec. 926. Signs; specific limitations and requirements.

926.1. Projecting signs, marquees, awnings, and the like; vertical and horizontal clearances.

Vertical clearances, projections, and clearance from curblines as projected vertically, for projecting signs including marquees, and for awnings, canopies, and the like, whether or not bearing signs, shall be as provided in the South Florida Building Code, section 4208, Limitations on projecting signs; section 4304, Location and use (canvas

awnings and canopies); and section 4404, Location (rigid awnings, canopies, or canopy shutters).

Except as otherwise specified in these zoning regulations, projecting signs shall comply with the yard requirements of the districts in which located.

926.2. Roof signs; new roof signs prohibited.

With respect to repair of existing roof signs, the provisions of the South Florida Building Code, section 4206, Limitations on roof signs, shall apply. No permits shall be issued under this zoning ordinance for new roof signs.

926.3. Ground signs.

With respect to the location of ground signs, the provisions of the South Florida Building Code, section 4207, Limitations on ground signs, shall apply, provided, however, that where this zoning ordinance establishes further limitations on location of such signs, such limitations shall apply.

926.4. Structural wall signs or flat signs; clearance above public walkways.

Structural wall signs or flat signs shall provide clearance above public walkways as required by the South Florida Building Code, section 4209.5.

926.5. Limitations on wording and illumination of signs; prohibition against blocking egress, light, or ventilation.

In addition to the limitations and restrictions set forth in this zoning ordinance, the provisions of the South Florida Building Code, section 4209, Detailed requirements, shall apply with respect to blocking required

egress, light or ventilation, movement or rotation of sign parts in such a manner as to resemble danger lights or lights on emergency vehicles, wording on unofficial signs implying the need or requirement for stopping or the existence of danger when such conditions do not actually exist, or illumination likely to cause confusion with traffic signals.

926.5.1. Real estate signs, construction signs, development signs shall not mislead as to zoning status of property. No real estate, construction, or development sign shall in any manner state or convey or create the impression that such property may be used for any purpose for which it is not zoned, or that any structure may be used for purposes not permitted by zoning or other regulations.

926.5.2. Limitations on illuminated or flashing signs; flashing signs prohibited in certain areas adjacent to residential districts. No sign shall be illuminated or flashing unless such signs are specifically authorized by the regulations for the district in which erected.

Whether or not flashing signs are authorized generally within a district, no flashing sign shall be permitted within one hundred (100) feet of any portion of property in a residential district, as measured along the street frontage on the same side of the street, or as measured in a straight line to property across the street, if the flashing element of such sign is directly visible from the residential property involved (see also section 1107.2.1).

926.6. Prohibition against revolving or whirling signs and pennant or streamer signs; exception.

Revolving or whirling signs and pennant or streamer signs are hereby prohibited unless such signs are specifically authorized by the regulations for the district in which erected.

926.7. Limitations on use of sign vehicles.

For purposes of these regulations, sign vehicles shall be considered to be sign structures, subject to any regulations applying thereto and to signs displayed thereon, and shall also be subject to any regulations herein set forth or otherwise applying to vehicles and their storage, parking, or location on premises.

926.8. Prohibition against sign placement impeding visibility of traffic or pedestrians, or creating other hazards.

No sign or sign support structure shall be so placed as to create hazards to pedestrians or traffic on either public or private premises. In particular, no sign or sign support structure shall be so placed as to violate the provisions of section 908.11, Vision clearance at intersections, or to impede visibility of traffic or pedestrians at other points on public or private premises where such visibility is reasonably necessary to safety, or to create potential hazards to individual vehicles being driven or maneuvering incidental to parking, loading or unloading, on public or private premises.

926.9. Signs of historic significance.

Any sign determined to be of historic significance by the Historic and Environmental Preservation Board, through resolution that makes findings according to the

criteria below, may be exempted by Class II Special Permit from any sign limitation imposed by this ordinance. The placement of said sign may be as approved by said Class II Special Permit, in any zoning district deemed appropriate according to the considerations and standards below, by the director of the planning, building and zoning department.

926.9.1. Historic sign criteria. The Historic and Environmental Preservation Board may determine that a sign is of historic significance upon finding that said sign contributes to the cultural, historic, or aesthetic character of the city, neighborhood, or streetscape, due to its construction materials, age, prominent location, unique design, or craftsmanship from another period.

926.9.2. Class II Special Permit required. Upon receipt of the findings of historic significance by the Historic and Environmental Preservation Board, the director of the planning, building and zoning department may issue a Class II Special Permit allowing said historic sign to be repaired, restored, structurally altered, reconstructed, or relocated. The director may refer the application for a Class II Special Permit to the Historic and Environmental Preservation Board for review and recommendation.

926.9.2.1. Class II Special Permits, considerations and standards. The director shall be guided by the following considerations and standards in his decision as to the issuance of a Class II Special Permit:

(a) Due consideration shall be given to the size, character, location, and orientation of the sign, with particular reference to traffic safety, glare, and compatibility with adjoining and nearby properties.

(b) Due consideration shall also be given to the relative historic significance of the sign versus any potentially adverse effects on adjoining and nearby properties, the area, or the neighborhood with reference to location, construction, design, character, or scale.

926.10. Removal, repair, or replacement of certain signs; prohibition against repair or replacement of certain nonconforming signs ordered removed.

In addition to removal required for nonconforming signs at section 1107.2, the following rules, requirements, and limitations shall apply with regard to removal, repair, or replacement of certain signs, as indicated below. Orders concerning removal, repair, or replaceement shall be guided by the following rules:

(a) If such signs are otherwise lawful, except for the condition or circumstance leading to the order, the order shall require repair or replacement within a stated time, not to exceed ninety (90) days from the date of the order, or removal prior to the expiration of such period. Such order shall specify that, upon failure to comply within such period, the city shall cause the signs to be removed, with costs assessed against the owner or lessor of the property or the owner of the sign, as appropriate to the circumstances of the case.

(b) If such signs are nonconforming under the terms of this ordinance by reason of character or location or the use with which associated, or exceed, in combination with other signs on the premises, limitations on number or area of signs, the order shall require any nonconforming signs to be removed or made to conform within a stated time, not to exceed ninety (90) days from the date of

the order, and shall specify as above with regard to removal by the city.

926.10.1. Unsafe signs. Unsafe signs, found to be so under the terms of section 202 of the South Florida Building Code, shall be removed, repaired or replaced as provided therein, if othrwise lawful. If nonconforming, such signs shall be removed.

926.10.2. Decrepit or dilapidated signs. Signs found to be decrepit or dilapidated (whether or not determined to be unsafe as provided above) shall be removed, repaired, or replaced if otherwise lawful. If nonconforming, such signs shall be removed.

926.10.3. Onsite signs advertising establishments, commodities, or services no longer on premises. Onsite signs advertising establishments, commodities, or services previously associated with the premises on which erected, but no longer there, shall be removed within six (6) months from the time such activity ceases. If otherwise lawful, such signs may be replaced by signs advertising establishments, commodities, or services currently associated with the premises. If nonconforming, such signs shall not be replaced.

926.10.4. Offsite signs bearing obsolete advertising matter. Offsite signs advertising establishments or attractions, commodities, or services which no longer exist or are no longer available, or bearing other obsolete advertising matter, shall be removed. If otherwise lawful, such signs may be replaced by current advertising material. If nonconforming, such signs shall not be replaced.

926.11. Structural members of signs required to be concealed or otherwise made visually unobtrusive.

Structural members of all signs, including supports, shall be covered, painted, and/or designed in such a manner as to be visually unobtrusive.

926.12. Signs of graphic or artistic value.

For the purposes of this section, commercial messages shall be defined as text, logos or display of products.

Graphic or artistic signs, or murals, with or without commercial messages and with no limitation to size, shall be permissible within the SD-6, SD-6.1 and CBD zoning districts, excluding those portions of these districts which lie north of I-395, by Class II Special Permit with city commission approval; said signs may be placed on the facade of buildings when it is determined by the city commission that the proposed signs comply with the following criteria and limitations:

1. The image is of graphic or artistic value or meets the criteria of the Miami-Dade County Art In Public Places ordinance;

2. The commercial message shall be limited to a maximum of ten (10) percent of the total graphic surface and shall be located in the margin of the graphic area; said commercial message may be located elsewhere if it is limited to five (5) percent of the total graphic surface;

3. If a for-profit entity has erected the sign or the sign advertises a for-profit entity or product, the city shall be paid a permit fee of five thousand dollars ($5,000.00) for the first year and shall require annual renewals with fees equal to five (5)

percent of the gross proceeds from the advertising rights on said signs, or five thousand dollars ($5,000.00), whichever is greater, the fee is not required for a change of copy;

4. Consideration for approvals shall also be given to the appropriateness of the proposed sign on an existing building (particularly if the building is historic) as well as the amount of such signs already existing within the immediate area or street; the purpose of this consideration is to ensure that the number of such signs do not have an overall adverse effect to the downtown area.

5. As a condition precedent to the issuance of the Class II Special Permit said sign must be submitted to the Urban Development Review Board "UDRB" for its review, consideration and approval.

926.13-926.14. Reserved.

926.15. Outdoor advertising signs.

Signs used in the conduct of the outdoor advertising business shall be regulated and restricted as follows in districts in which they are permitted:

926.15.1. Limitations on sign area, including embellishments; limitations on projections of embellishments. The area of an outdoor advertising sign shall not exceed seven hundred fifty (750) square feet, for each surface, including embellishments, if any (with sign and embellishment area as defined at section 2502).

Total area of embellishments, including portions falling within or superimposed on the general display area, shall not exceed one hundred (100) square feet.

No embellishment shall extend more than five (5) feet above the top of the sign structure, or two (2) feet beyond the sides or below the bottom of the sign structure.

Embellishments shall be included in any limitations affecting minimum clearance or maximum height of signs, permitted projections, or distance from any structure or lot or street line.

926.15.2. Limitations on location, orientation, spacing, height, type and embellishments of outdoor advertising signs in relation to limited access highways and expressways. Except as otherwise provided in section 926.15.1, outdoor advertising signs may be erected, constructed, altered, maintained or relocated within six hundred sixty (660) feet but no nearer than two hundred (200) feet of any limited access highway including expressways as established by the State of Florida or any of its political subdivisions, provided that such sign faces are parallel to or at an angle of not greater than thirty (30) degrees with the centerline of any such limited access highway and faced away from such highway.

926.15.2.1. No outdoor advertising sign which faces a limited access highway including expressways as established by the State of Florida to a greater degree than permitted in section 926.15.2. shall be erected, constructed, altered, maintained, replaced or relocated within six hundred sixty (660) feet of any such highways including expressways, easterly of I-95 and southerly of 36th Street.

Outdoor advertising signs, a maximum of ten (10) in number, including those presently in place, which face such limited access highways may be erected, constructed, altered, maintained, replaced or relocated within two hundred (200) feet of the westerly side of I-95 right-of-way lines, or that portion of the easterly side of I-95 which lies north of 36th Street, or of any limited access highway, including expressways as established by the State of Florida or any of its political subdivisions, westerly of I-95; or which lie easterly of I-95 and north of 36th Street, after city commission approval, and subject to the following conditions:

(a) An outdoor advertising sign structure approved pursuant to this ordinance shall be spaced a minimum of fifteen hundred (1500) feet from another such advertising structure on the same side of a limited access highway including expressways facing in the same direction.

(b) The height of the structure shall not exceed a height of fifty (50) feet measured from the crown of the main traveled road, and in no instance shall exceed a maximum height of sixty-five (65) feet measured from the crown of the nearest adjacent or arterial street.

(c) The sign structure shall be of unipod construction with pantone matching color system PMS180U reddish brown or PMS463U dark brown or similar color, and with only two (2) sign faces back to back at a maximum horizontal

angle of thirty (30) degrees from each other.

(d) No flashing, blinking or mechanical devices shall be utilized as a part of the outdoor advertising sign.

(e) Sign area, embellishments and projections shall be as set forth in section 926.15.1.

926.15.3. Limitations on spacing of outdoor advertising signs in relation to federal-aid primary highway systems. Outdoor advertising signs shall be spaced a minimum of one thousand (1,000) feet from another sign, or an approved location, on the same side of a federal-aid primary highway.

926.15.4. Landscaping. All outdoor advertising sites shall be appropriately landscaped as follows: One (1) shade tree for the first five hundred (500) square feet of site area and one (1) side shade tree for each additional one thousand (1,000) square feet or portion thereof of site area; the remainder of the site area shall be landscaped with equal portions of hedges and/or shrubs and living ground cover. Said landscaping shall be provided with irrigation and be maintained in perpetuity.

926.15.4.1. [Revocation.] Any sign permit issued pursuant to section 926 et seq. shall be subject to revocation, subsequent to a public hearing by the city commission, should city inspectors find that the subject site is not being maintained according to approved landscaping plans or is being kept in an unclean or unsightly manner.

926.16. Limitations on onsite signs above a height of fifty (50) feet above grade.

Except as otherwise provided in section 609 of this zoning ordinance, the following regulations shall apply to all onsite signs above a height of fifty (50) feet above grade:

1. Building sign content shall be limited to the name of the building or the names of up to two (2) major tenant(s) of the building occupying more than five (5) percent of the gross leasable building floor area.

2. Signs shall consist only of individual letters and/or a graphic logotype. No graphic embellishments such as borders, or backgrounds shall be permitted.

3. The maximum height of a letter shall be as follows:

If Any Portion of a Sign Is	*Maximum Letter Height (feet)*
Over fifty (50) feet but less than two hundred (200) feet above grade	4
Over two hundred (200) feet but less than three hundred (300) feet above grade	6
Over three hundred (300) feet but less than four hundred (400) feet above grade	8
Over four hundred (400) feet above grade	9

The maximum height of a logo may exceed the maximum letter height by up to fifty (50) percent if its width does not exceed its height. When text and a graphic logotype are combined in an integrated fashion to form a seal or emblem representative of an institution or corporation, and when this emblem is to serve as the principal means of building identification, the following regulations shall apply.

If Any Portion of a Sign Is	*Maximum Sign Surface (sq. ft)*
Over fifty (50) feet but less than two hundred (200) feet above grade	200
Over two hundred (200) feet but less than three hundred (300) feet above grade	300
Over three hundred (300) feet but less than four hundred (400) feet above grade	400
Over four hundred (400) feet above grade	500

4. The maximum length of the sign shall not exceed eighty (80) percent of the width of the building wall upon which it is placed, as measured at the height of the sign. The sign shall consist of not more than one (1) horizontal line of letters and/or symbols, unless it is determined through Class II review that two (2) lines of lettering would be more compatible with the building design. The total length of the two (2) lines of lettering, end-to-end, if permitted, shall

not exceed eighty (80) percent of the width of the building wall.

5. Not more than four (4) signs for a single major tenant or not more than two (2) signs shall be permitted per major tenant, defined as a tenant occupying more than five (5) percent of the gross leasable floor area of the bulding for a maximum of two (2) major tenants.

6. No variance from maximum size of letter, logotype, length of sign, number of signs or sign content shall be granted.

7. All sign permits shall be subject to Class II approval and review by the Urban Development Review Board (UDRB). The UDRB shall recommend its findings to the planning, building and zoning director. The planning, building and zoning director may waive review by the UDRB if such review procedures would delay issuance of a Class II Special Permit by more than twenty-one (21) days from the date of permit application. The UDRB and Class II design review shall be based on the following guidelines:

   (a) Signs should respect the architectural features of the facade and be sized and placed subordinate to those features. Overlapping of functional windows, extensions beyond parapet edges obscuring architectural ornamentation or disruption of dominant facade lines are examples of sign design problems considered unacceptable.

   (b) The sign's color and value (shades of light and dark) should be harmonious with building materials. Strong contrasts in color or value between the sign and building that draw undue visual attention to the sign at

the expense of the overall architectural composition shall be avoided.

(c) In the case of a lighted sign, a reverse channel letter that silhouettes the sign against a lighted building face is desirable. Lighting of a sign should be accompanied by accent lighting of the building's distinctive architectural features and especially the facade area surrounding the sign. Lighted signs on unlit buildings are unacceptable. The objective is a visual lighting emphasis on the building with the lighted sign as subordinate.

(d) Feature lighting of the building, including exposed light elements that enhance building lines, light sculpture or kinetic displays that meet the criteria of the Dade County art-in-public places ordinance, shall not be construed as signage subject to these regulations.

(Ord. No. 10771, § 1, 7-26-90; Ord. No. 10879, § 1, 4-25-91; Ord. No. 10998, § 1, 9-24-92; Ord. No. 11204, § 2, 11-17-94; Ord. No. 11315, § 1, 9-28-95; Ord. No. 11376, § 2, 6-27-96; Ord. No. 11604, § 3, 1-27-97; Ord. No. 11677, § 2, 6-23-98)

Sec. 934. Community based residential facilities.

934.2.2.6. Limitations on signs. Signs shall be limited to a nameplate not exceeding two (2) square feet for each street frontage.

Sec. 1107. Nonconforming characteristics of use.

1107.2. Signs.

The following provisions shall apply to signs as a nonconforming characteristic of use:

1107.2.1. Removal in residential districts. In all residential districts, nonconforming signs shall be removed within one (1) year of the effective date of this ordinance or its amendment, or within that period such signs shall be made to conform; provided, however, that nonconforming nonresidential uses in residential districts shall be permitted to maintain signs as provided in regulations for the first district in which such uses would be conforming.

1107.2.2. Removal in other districts. In any district other than residential, any sign, billboard, or commercial advertising structure which constitutes a nonconforming characteristic of use may be continued, provided no structural alterations are made thereto, subject to the following limitations on such continuance:

(a) Any such sign except a roof sign shall be completely removed from the premises within five (5) years from the date it became nonconforming;

(b) Article XXIV, section 1, subsection 7(a), and article XXVIII, section 3, subsection 3(a), Ordinance No. 6871, as amended, repealed by Ordinance No. 9500, as amended, the same being provisions dealing with roof signs and requiring their termination and removal from the

premises on which they are located not later than twelve (12) years following the date they became nonconforming, shall continue to be operative and given full force and effect. All legal proceedings begun and all legal proceedings that might have been begun under these provisions of Ordinance No. 9500, as amended, prior to the repeal of Ordinance No. 9500, as amended, shall be given full force and effect as though Ordinance No. 9500, as amended, had not been repealed.

(Ord. No. 10863, § 1, 3-28-91)

ARTICLE 13. SPECIAL PERMITS: GENERALLY

1304.2.3. Application forms; supplementary materials. During processing of any application, if it is determined by the designated agent, agency, or body of the city that in the particular circumstances of the case additional information is required to make necessary findings bearing on its approval, denial, or conditions and safeguards to be attached, such information may be requested. Failure to supply such supplementary information may be used as grounds for denial of the permit.

(Ord. No. 10863, § 1, 3-28-91; Ord. No. 10976, § 1, 4-20-92; Ord. No. 11079, § 4, 7-22-93)

Sec. 1305. Considerations generally; standards; findings and determinations required.

1305.4. Signs and lighting.

Review for adequacy shall be given to the number, size, character, location, and orientation of proposed signs, and of proposed lighting for signs and premises, with particular reference to traffic safety, glare, and compatibility and harmony with adjoining and nearby property and the character of the area.

ARTICLE 25. DEFINITIONS

Sec. 2502. Specific definitions.

Bulletin board. An outdoor display device accessory to and on the premises of places of worship, schools, or other institutions, auditoriums and the like for providing public notice identifying the premises and indicating nature and hours of events, names of principal officers, and the like. As employed in relation to these and other principal uses, the term is also intended to include outdoor display devices serving as directories and giving guidance as to the location of persons or uses on the premises.

Bulletin board, community or neighborhood. An outdoor display device intended and reserved for the free and informal posting of temporary notices by individuals or public or quasi-public organizations, clubs, and the like. Such notices may include announcements of neighborhood or community-wide meetings, entertainments or events, lost and found notices, notices offering or seeking employment, notices offering to buy or sell, or seeking or offering transportation or accommodations.

Frontage, as specially related to sign regulation and pedestrian streets/pathways. Adjacent to a street, whether at the front, rear, or side of a lot.

Kiosk. A freestanding bulleting board having more than two (2) faces.

Outdoor advertising business. An establishment which provides outdoor displays or display space on a lease or rental basis for general advertising and not primarily or necessarily for advertising related to the premises on which erected. Outdoor advertising signs shall be construed as including any billboards, poster panels, or other displays or display spaces or surfaces used in the conduct of the outdoor advertising business.

Sign. Any display that informs or attracts the attention of persons not on the premises on which it is located, provided, however that the following shall not be included in the application of these regulations:

(a) Signs not exceeding one (1) square foot in area and bearing only property numbers, postbox numbers, names of occupants of premises, or other identification of premises not having commercial connotations;

(b) Flags and insignia of any government except when displayed in connection with commercial promotion;

(c) Legal notices;

(d) Identification, informational or directional signs erected or required by governmental bodies;

(e) Integral ornamental or architectural features of buildings, except letters, trademarks, moving parts, or moving lights.

Sign, address. Signs limited in subject matter to the street number and/or postal address of the property, the names of occupants, the name of the property, and, as appropriate to the circumstances, any matter permissible in the form of notice, directional, or warning signs, as defined below. Names of occupants may include indications as to their professions, but any sign bearing advertising matter shall be construed to be an advertising sign, as defined below.

Sign, advertising. Signs intended to promote the sale of goods or services, or to promote attendance at events or attractions. Except as otherwise provided, any sign bearing advertising matter shall be considered an advertising sign for the purposes of these regulations.

Sign, animated. Any sign or part of a sign which changes physical position by any movement or rotation or which gives the visual impression of such movement or rotation. Such displays are prohibited.

Sign, revolving or whirling. A revolving or whirling sign is an animated sign, which revolves or turns, or has external sign elements which revolve or turn, at a speed greater than six (6) revolutions per minute. Such sign may be power-driven or propelled by the force of wind or air.

Sign, banner. A sign made from flexible material suspended from a pole or poles, or with one (1) or both ends attached to a structure or structures. Where signs are composed of strings of banners, they shall be construed to be pennant or streamer signs.

Sign, canopy, marquee or awning. A sign painted, stamped, perforated, stitched or otherwise applied on the

valance of an awning, eyelid or other protrusion above or around a window, door or other opening on a facade.

Sign, construction. A temporary sign erected on the premises on which construction is taking place, during the period of such construction, indicating the names of individuals or entities associated with, participating in or having a role or interest with respect to the project. Notable features of the project under construction may be included in construction signs by way of text and/or images.

Sign, development. Onsite signs announcing features of proposed developments, or developments either completed or in process of completion.

Sign, directional. A sign containing an instructive message intended to guide traffic and devoid of any commercial connotations.

Sign, flashing. A sign which gives the effect of intermittent movement, or which changes to give more than one (1) visual effect. For the special purposes of these regulations, time and temperature signs shall not be construed to be flashing signs, but are regulated separately.

Sign, frontage, as related to regulation. Notwithstanding definitions in this zoning ordinance referring to lot frontage, for the purpose of regulating the number of signs, the term "fronting on a street," "street frontage," or "frontage" shall be construed as adjacent to a street, whether at the front, rear, or side of a lot.

Sign, ground or freestanding. Any non-movable sign not affixed to a building, a self supporting sign. Ground signs shall be construed as including signs mounted on

poles or posts in the ground, signs on fences, signs on walls other than the walls of buildings, signs on sign vehicles, portable signs for placement on the ground (A-frame, inverted T-frame and the like), signs on or suspended from tethered balloons or other tethered airborne devices, and signs created by landscaping. (See "portable sign" below).

Sign, hanging. A projecting sign suspended vertically from and supported by the underside of a canopy, marquee, awning or from a bracket or other device extending from a structure.

Sign, home occupation. A sign containing only the name and occupation of a permitted home occupation.

Sign, identification. A sign which contains no advertising but is limited to the name, address and number of a building, institution or person and to the activity carried on in the building or institution or the occupation of the person.

Sign, illuminated. A sign illuminated in any manner by an artificial light source. Where artificial lighting making the sign visible is incidental to general illumination of the premises, the sign shall not be construed to be an illuminated sign.

Sign, indirectly illuminated. A sign illuminated primarily by light directed toward or across it or by backlighting from a source not within it. Sources of illumination for such signs may be in the form of gooseneck lamps, spotlights, or luminous tubing. Reflectorized signs depending on automobile headlights for an image in periods of darkness shall be construed to be indirectly illuminated signs.

Sign, internally (or directly) illuminated. A sign containing its own source of artificial light internally, and dependent primarily upon such source for visibility during periods of darkness.

Sign, notice, directional, and warning. For the special purposes of these regulations, notice, directional, and warning signs are defined as signs bearing no advertising matter and limited to providing notice concerning posting of property against trespass, directing deliveries or indicating location of entrance, exits and parking on private property, indicating location of buried utilities, warning against hazardous conditions, prohibiting salesmen, peddlers, or agents, and the like.

Sign, offsite. A sign other than an onsite sign. The term includes, but is not limited to, signs erected by the outdoor advertising industry in the conduct of the outdoor advertising business.

Sign, onsite. A sign relating in its subject matter to the premises on which it is located, or to products, accommodations, services, or activities on the premises. Onsite signs shall not be construed to include signs erected by the outdoor advertising industry in the conduct of the outdoor advertising business.

Sign, outdoor advertising. A sign which provides outdoor displays or display space on a lease or rental basis for general advertising and not primarily or necessarily for advertising related to the premises on which erected. Outdoor advertising signs shall be construed as including any billboards, poster panels, or other displays or display spaces or surfaces used in the conduct of the outdoor advertising business.

Sign, pennant or streamer. Pennant or streamer signs or signs made up of strings of pennants, or composed of ribbons or streamers, and suspended over open premises and/or attached to buildings.

Sign, portable. A sign, not permanently affixed to a building, structure or the ground.

Sign, projecting. A sign wholly or partially attached to a building or other structure and which projects more than twelve (12) inches from its surface.

Sign, real estate. Signs used solely for the purpose of offering the property on which they are displayed for sale, rent, lease, or inspection or indicating that the property has been sold, rented, or leased. Such signs shall be nonilluminated and limited in content to the name of the owner or agent, an address and/or telephone number for contact, and an indication of the area and general classification of the property.

Real estate signs are distinguished in these regulations from other forms of advertising signs and are permitted in certain districts and locations from which other forms of advertising signs are excluded.

Sign, roof. A sign affixed in any manner to the roof of a building, or a sign mounted in whole or in part on the wall of the building and extending above the eave line of a pitched roof or the roof line (or parapet line, if a parapet exists) of a flat roof.

Sign, temporary. A sign or advertising display intended to be displayed for a limited and brief period of time.

Sign, time and temperature. A sign conveying lighted messages indicating time, temperature, tide change, barometric pressure, or wind speed and direction, by means of illuminated letters or numbers with change intervals for such messages of not less than (4) seconds. For purposes of these regulations, time and temperature signs shall not be construed to be flashing signs or animated signs.

Sign, vehicle. A trailer, automobile, truck, or other vehicle used primarily for the display of signs (rather than with sign display incidental to use of the vehicle for transportation). For purposes of these regulations, signs or sign vehicles shall be considered to be ground signs except for temporary political or civic campaign signs on sign vehicles.

Sign, wall or flat. A sign painted on the outside of a building, or attached to, and erected parallel to the face of a building, and supported throughout its length by such building.

Sign, window. A sign painted, attached or affixed in any manner to the interior or exterior of a window which is visible, wholly or in part from the public right-of-way.

Sign structure. A structure for the display or support of signs. In addition, for purposes of these regulations, and notwithstanding the definition of structure generally applicable in these zoning regulations, any trailer or other vehicle, and any other device which is readily movable and designed or used primarily for the display of signs (rather than with signs as an accessory function) shall be construed to be a sign structure, and any signs thereon shall be limited in area, number, location, and other characteristics

in accordance with general regulations and regulations applying in the district in which displayed.

Signs, area of. The surface area of a sign shall be computed as including the entire area within a parallelogram, triangle, circle, semicircle or other regular geometric figure, including all of the elements of the matter displayed, but not including blank masking (a plain strip, bearing no advertising matter around the edge of a sign), frames, display of identification or licensing officially required by any governmental body, or structural elements outside the sign surface and bearing no advertising matter. In the case of signs mounted back-to-back or angled away from each other, the surface area of each sign shall be computed. In the case of cylindrical signs, signs in the shape of cubes, or other signs which are substantially three-dimensional with respect to their display surfaces, the entire display surface or surfaces shall be included in computations of area.

In the case of embellishments (display portions of signs extending outside the general display area), surface area extending outside the general display area and bearing advertising material shall be computed separately as part of the total surface area of the sign.

Notwithstanding definitions in this zoning ordinance referring to lot frontage, for the purpose of regulating the area of signs, the terms "fronting on a street," "street frontage," or "frontage" shall be construed as adjacent to a street, whether at the front, rear, or side of a lot. (See also diagram on number and area of signs.)

Signs, number of. For the purpose of determining the number of signs, a sign shall be considered to be a single display surface or display device containing elements

organized, related, and composed to form a unit. Where matter is displayed in a random manner without organized relationship of units, where strings of lights are used, or where there is a reasonable doubt about relationship of elements, each element or light shall be considered to be a single sign. Where sign surfaces are intended to be read from different directions (as in the case of signs back-to-back or angled from each other), each surface shall be considered to be a single sign.

Notwithstanding definitions in this zoning ordinance referring to lot frontage, for the purpose of regulating the number of signs, the term "fronting on a street," "street frontage," or "frontage" shall be construed as adjacent to a street, whether at the front, rear, or side of a lot.

Symbolic, award flags, house flags or banners. Flags or banners identifying institutions or establishments symbolically or indicating special awards, but bearing no advertising matter other than the symbol of the institution or establishment.

No. 05-500

IN THE

Supreme Court of the United States

NATIONAL ADVERTISING CO.,

Petitioner,

v.

CITY OF MIAMI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a court may prudentially determine that a First Amendment challenge to a billboard licensing law is not ripe for adjudication, where the challenger has failed to obtain a denial of its billboard applications?

II. [The second question presented for review by the Petitioner is premised upon a misstatement of the holding of the circuit court. Because of this, we are unable to present an alternative question. We explain this further in our argument.]

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STATEMENT OF THE CASE

This case involves National Advertising's attempt to set up litigation. It sent "permitting experts" to apply for billboard permits from the City of Miami, in the hopes of laying the predicate for a constitutional challenge to the City of Miami Zoning Ordinance. (App. 11). However, in its rush to the courthouse, National Advertising neglected to obtain a denial of the permit applications which it had partially processed. (*Id.*). Rather than presenting the applications to the appropriate building official, National Advertising's representatives went directly to its lawyer's office to commence preparation of the lawsuit. (*Id.*).

Both the district court and the circuit court held that both constitutional and prudential limitations counseled against deciding this lawsuit. *National Advertising v. City of Miami*, 288 F. Supp.2d 1282 (S.D. Fla. 2003), *aff'd*, 402 F.3d 1335 (11th Cir. 2005). These fact-based conclusions were correct—and they certainly provide no basis for this Court to grant the writ.

The incomplete set-up

National Advertising's agents filed seven applications for billboards with the City of Miami. (App. 2-3). The applications were "rejected" by the intake clerk during the initial walkthrough. (App. 13, 19). However, the evidence was clear that this did not constitute a denial of the permits, as that could be done only by the head of the Building and Zoning Department. (App. 19-20). The intake clerk does not have the authority to grant or deny a permit. (App. 27-28).

Only the head of Building and Zoning has the authority to grant or deny permits. (App. 27-28). One of the people who walked through some of National Advertising's applications admitted this: "[i]t is my understanding that the zoning official works with the building official and is one of those stops along the way on permit approval in that process." (App. 28). He conceded that "an official denial is when we have something in writing that says its denied." (App. 28). But National Advertising obtained no written denial. (App. 28). National Advertising didn't even discuss its applications with a supervisor, or obtain a final decision by the head of Building and Zoning. National Advertising had alternatives available, such as revising aspects of the applications, or seeking a rezoning. (App. 28). But National Advertising did not avail itself of these alternatives. (App. 28). Rather than obtain a final denial of the permits, or attempt alternatives, National Advertising simply went to its lawyer's office, and filed suit.

The district court finds that the lawsuit is not ripe

The district court concluded that National Advertising's lawsuit was not ripe, and granted summary judgment for the City of Miami on that basis. (App. 11-31).

The court held that National Advertising—by failing to obtain a denial of its application for permits—could not yet raise a constitutional attack on the ordinance and permitting process. (App. 13, 29). "The permit applications were simply rejected by clerks and were not *denied* by the only person who had authority to deny with finality a building permit." (App. 21, emphasis in original). The court added:

> This case represents National's rush to the courthouse to file a Complaint in a case where

> the City did not have the opportunity to make a final decision on the permit applications in question. As a result, the City is being dragged through expensive and contentious litigation on the oral conclusion of a zoning plans examiner that National's six permit applications did not comply with the Zoning Ordinance.

(App. 29).

The circuit court affirms the district court's conclusion that the lawsuit is not ripe

The United States Court of Appeals for the Eleventh Circuit agreed with the district court's conclusion that National Advertising, in its rush to the courthouse without obtaining an official rejection of its permit applications, had failed to present a controversy ripe for adjudication.

The circuit court concluded that the claim "is not ripe because [National Advertising] failed to obtain a final denial of its application." (App. 6). It noted that "[a] challenge to the application of a city ordinance does not automatically mature at the zoning counter." (App. 7, citation omitted). "While there is some dispute why the City did not grant National's initial application, National failed to demonstrate that their application was conclusively *denied*." (App. 7-8, emphasis in original). The court concluded that on the state of the record, the case did not present a sufficiently concrete claim: "As this case currently stands, a court is incapable of determining *if*, let alone why, National's applications were denied." (App. 8, emphasis in original).

The court, after finding that National Advertising's hurried claims were not ripe for judicial review, also concluded that there was no evidence that National Advertising would sustain undue hardship as a result of the court withholding consideration. (App. 9).

REASONS FOR DENYING THE PETITION

I.

The circuit court's prudential conclusion that National Advertising's claims are not ripe, where National Advertising rushed to the courthouse without obtaining an official rejection of its applications, does not conflict with any decision of this Court or a circuit court

There is no reason for the Court to grant the writ. National Advertising rushed to the courthouse, without obtaining a formal ruling on its permit applications. Indeed, it merely spoke to an intake clerk. The decision of the circuit court, which found that National Advertising's claims are not ripe for federal court adjudication, does not conflict with any decision of this Court or the circuit courts.

Ripeness is a jurisdictional issue, and the courts therefore may not entertain claims unless it is clear that the claims are ripe. *Renne v. Geary*, 501 U.S. 312, 316 (1991). Ripeness is part of the constitutional and prudential limitations on the jurisdiction of the federal courts. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733 (1997). The basic rationale of the ripeness doctrine is to ensure that, though avoidance of premature adjudication, the courts do not entangle themselves in abstract disagreements. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other*

grounds, Califano v. Sanders, 430 U.S. 99 (1977). Ripeness is "peculiarly a question of timing," as cases may later become ready for adjudication even if deemed premature on initial presentation. *Blanchette v. Connecticut General Insurance Corporation*, 419 U.S. 102, 140 (1974).

A federal court must consider the fitness of the issues for judicial decision, and the hardship to the parties of withholding court consideration. *Abbott Labs. v. Gardner*, 387 U.S. at 149. The question of the fitness of the issues for judicial review considers the sensitivity of the issues and whether there is a need for more factual development. The question of hardship considers prudential matters.

There are a number of considerations underlying the ripeness requirement. Requiring a claimant to obtain a final decision from the local authority assists in the development of a full record. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 187 (1985). In addition, requiring a property owner to obtain a final, definitive position from zoning authorities evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution. *See Murphy v. New Milford Zoning Commission*, 402 F.3d 342, 348-49 (2d Cir. 2005).

The question of ripeness is fact-sensitive. *Murphy v. New Milford Zoning Commission*, 402 F.3d at 350. The prudential considerations are discretionary. *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc).

These principles lead to the conclusion that the Court should not grant the writ in this case. The circuit court

decision was a fact-specific conclusion that this case is not ripe for judicial determination. There is abundant support for this conclusion, since the record demonstrates that National Advertising did nothing more than send someone to talk with the intake clerk about its applications. There was no denial of the applications. National Advertising did not pursue the matter, but instead decided to file suit.

This case is, therefore, nothing more than a litigant displeased with a court of appeals decision. This can be seen most clearly from National Advertising's statement of the question presented. National Advertising requests that the Court review a question which begins, "Where municipal zoning officials have rejected applications for permits. . . ." (Petition, at i). But the circuit court concluded that "National never obtained an official rejection of its permit applications." 402 F.3d at 1337. National Advertising may disagree with the circuit court's decision, but that is no reason for this Court to grant the writ.

In its petition, National Advertising claims that the circuit court opinion conflicts with decisions of this Court and other circuits. (Petition, at 11). But it doesn't really ever get around to identifying the cases which it claims are in conflict. The closest it comes is its reliance on *Peachlum v. City of York*, 333 F.3d 429 (3d Cir. 2003). But a review of that case reinforces the Eleventh Circuit's conclusion that National Advertising's claims are not ripe. In the *Peachlum* case, the city's enforcement proceedings had

> been spread over a period of approximately ten years and the zoning ordinance has imposed immediate hardship upon [Peachlum]. The interim decision of the zoning authorities has been

> formalized and its effects felt in a concrete way. Peachlum has had two civil judgments entered against her levying over $1,000 in fines and costs.

Id. at 436-37. Furthermore, Peachlum was unable to appeal the administrative ruling, since she did not have the required filing fee. *Id.* at 439. Ms. Peachlum's lawsuit—based on a decade of conflict, and after two judgments had been entered against her—was ripe. National Advertising's claim—based on a quick conversation with an intake clerk—was not.[1]

National Advertising also relies on a prior Eleventh Circuit decision, *Granite State Outdoor Advertising v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003). That case did not involve ripeness, and the plaintiff there had obtained a denial of its application. Moreover, intra-circuit conflict of course is not a reason for this Court to grant the writ.

Finally, there is no black-letter rule holding that all First Amendment challenges, or even all First Amendment facial challenges, are automatically ripe for adjudication. At best, the courts have held that "the ripeness requirement is somewhat relaxed in the First Amendment context." *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002). *See also Dougherty v. Town of North Hempstead Board of Zoning Appeals*, 282 F.3d 83, 90-10 (2d Cir. 2002) (case ripe "[u]nder the circumstances here"); *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 479 (2d Cir. 1999). Courts have not

1. The *Peachlum* court in parts of its decision suggested that a facial First Amendment challenge might not normally be subject to administrative finality analysis, but this was dicta, as the court engaged in that analysis, and concluded that "even if the administrative finality doctrine is applicable to Peachlum's First Amendment claims, her claims are . . . ripe." 333 F.3d at 436-37.

hesitated to conclude that First Amendment claims are not ripe for adjudication. *See, e.g., Murphy v. New Milford Zoning Commission*, 402 F.3d 342 (2d Cir. 2005); *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

There is no conflict here. There is only a fact-specific, prudentially-based decision that National Advertising's rush to the courthouse did not present a ripe dispute for the federal courts. There is no reason for the Court to grant the writ.

II.

The circuit court dismissed National Advertising's lawsuit based on lack of ripeness, not based on the failure to exhaust administrative remedies, and there can thus be no conflict on the issue of the exhaustion of administrative remedies

National Advertising also claims conflict on the issue of exhaustion of administrative remedies. It claims that the circuit court "insist[ed] that National exhaust administrative remedies before pursuing a facial challenge to the City's Sign Code." (Petition, at 15).

National Advertising has confused the ripeness requirement (present in all cases) and the principle that a party must exhaust administrative remedies (which applies in some but not all cases). *See Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192 (1985) ("[T]he question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable."); *Peachlum v. City of York*, 333 F.3d 429, 436

(3d Cir. 2003) ("ripeness is not to be confused with exhaustion."). Where a party suffers a concrete injury prior to final administrative disposition, the claim may be ripe, even if all administrative remedies have not been exhausted. *Peachlum v. City of York*, 333 F.3d at 437; *Digital Properties v. City of Plantation*, 121 F.3d 586, 591 n.4 (11th Cir. 1997).

Here, the circuit court did *not* hold that National Advertising had to exhaust all administrative remedies. It merely held that National Advertising had not done enough to demonstrate that its dispute is ripe for adjudication: "Because National never obtained an official rejection of its permit applications, we find that it failed to present the district court with a ripe case." (App. 6). National Advertising didn't need to exhaust all of its possible remedies to have a ripe dispute. But it at least had to get a final adjudication on the *first* step of the way, which required a ruling by the head of the Building and Zoning Department.

Contrary to National Advertising's assertion, the circuit court did not impose an exhaustion of administrative remedies requirement. There is no conflict on this point, and no reason to grant the writ.

CONCLUSION

The petition for certiorari should be denied.

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